



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

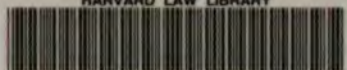
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARVARD LAW LIBRARY



3 2044 078 468 550



HARVARD LAW LIBRARY



CASES

DECIDED IN THE

Supreme Court of Ohio

UPON THE CIRCUIT

AND

AT A SPECIAL SESSION IN COLUMBUS

DECEMBER, 1825

REPORTED IN CONFORMITY WITH THE ACT OF ASSEMBLY

By CHARLES HAMMOND
ATTORNEY AT LAW

HARVARD LAW LIBRARY

VOLUME II

CINCINNATI
ROBERT CLARKE & CO.
1872

KFO
45
.A2

6-6-1887

TABLE OF CASES.

A.	
<p>Adams v. Bronson..... 135</p> <p>Adams, Lockwood v...... 397</p> <p>Allen, Barrett v...... 426</p> <p>Anderson v. Harold..... 399</p> <p>Armstrong v. Treas. Athens Co. 235</p> <p>Armstrong and others, Moore and others v...... 11</p> <p>Atherton, Nash v...... 163</p> <p>Atwood v. Bank of Chillicothe. 526</p>	<p>Buckingham and others v. Smith & Dille..... 288</p> <p>Same, Cincinnati v...... 257</p> <p>Buckley v. Blackwell's Heirs..... 508</p> <p>Burnett and others, Kent v...... 392</p> <p>Burnett, Foote v...... 317</p> <p>Burnett, Stocking v...... 137</p> <p>Bull and others, Wilson v...... 250</p>
B.	
<p>Bailey, Swift & Nichols v...... 230</p> <p>Bank of Chillicothe, Atwood v. 526</p> <p>Bank United States v. Dunseth. 18</p> <p>Same, Findley's Ex'rs v...... 59</p> <p>Bank of Canton v. Commercial Bank..... 71</p> <p>Barnett, Hulet v...... 459</p> <p>Barrett v. Allen..... 426</p> <p>Beach v. Hayward..... 455</p> <p>Beam, Larowe and wife v...... 498</p> <p>Bennett v. Morley..... 100</p> <p>Blackwell, Buckley v...... 508</p> <p>Bonham v. Taylor..... 108</p> <p>Bonner v. Ware..... 465</p> <p>Bowman and others, Ohio v...... 445</p> <p>Bradford, Eggleston v...... 312</p> <p>Brimfield Twp. v. Portage Co.... 283</p> <p>Brock v. Milligan..... 121</p> <p>Bronson v. Adams..... 135</p> <p>Brown & Kelley, Hyde v...... 215</p> <p>Brown, Moore v...... 197</p> <p>Brown v. Witter..... 142</p> <p>Brush, Turnpike Co. v...... 111</p>	<p style="text-align: center; padding-top: 10px;">C.</p> <p>Canal In. Co., Vairin v...... 223</p> <p>Carr v. Williams and others..... 305</p> <p>Case v. Heffner..... 180</p> <p>Cincinnati v. Gwynne..... 192</p> <p>Same v. Buckingham..... 257</p> <p>Clark, Harris v...... 5</p> <p>Cleveland, Rhodes v...... 159</p> <p>Coates, Sheldon v...... 278</p> <p>Commercial Bank, Bank of Canton v...... 71</p> <p>Commercial Bank and others, The State v...... 535</p> <p>Culver, De Segond v...... 188</p>
D.	
<p>Bonham v. Taylor..... 108</p> <p>Bonner v. Ware..... 465</p> <p>Bowman and others, Ohio v...... 445</p> <p>Bradford, Eggleston v...... 312</p> <p>Brimfield Twp. v. Portage Co.... 283</p> <p>Brock v. Milligan..... 121</p> <p>Bronson v. Adams..... 135</p> <p>Brown & Kelley, Hyde v...... 215</p> <p>Brown, Moore v...... 197</p> <p>Brown v. Witter..... 142</p> <p>Brush, Turnpike Co. v...... 111</p>	<p>Dangerfield, Douglas v...... 152</p> <p>De Segond v. Culver..... 188</p> <p>Dibble, Perkins v...... 433</p> <p>Dodge v. Gridley..... 173</p> <p>Doud and others, Lake v...... 415</p> <p>Douglas v. Dangerfield..... 152</p> <p>Douglas v. Dunlap..... 162</p> <p>Drakely, Duncan v...... 45</p> <p>Duncan v. Drakely..... 45</p> <p>Dunlap v. Mitchell..... 117</p>

Dunlap, Mitchell v.....	117	Huber's Adm'rs Huber v.....	371
Dunlap, Douglas v.....	162	Huber v. Huber's Adm'rs.....	371
Dunseth, Bank United States v.	18	Hughes v. Watson.....	127
E.		Hulburd, Hawkins v.....	178
Eggleston v. Bradford.....	312	Hulet v. Barnett.....	459
Ellis and others, Ohio v.....	456	Hungerford and others, Ohio v.	268
Ellison, Prather v.....	396	Huse, Wilkins' Heirs v.....	139
F.		Hyde & Brown v. Kelley.....	215
Fahs v. Taylor.....	104	J.	
Farrington v. Ohio.....	354	Jackson v. Williams.....	69
Farrington v. Gallaway.....	543	Johnson, Turner v.....	204
Fee's Adm'r v. Fee.....	469	Jones v. Voorhees.....	145
Fee, Fee's Adm'r v.....	469	K.	
Findlay's Ex'rs v. Bank United States.....	59	Keefe and others, Meese v.....	362
Findley, Ohio v.....	51	Kegg v. The State of Ohio.....	75
Finley, Steamboat Monarch v...	384	Kelley, Hyde & Brown v.....	215
Fisher v. Miles.....	1	Kent v. Burnett and others.....	392
Flagg, Longworth v.....	300	L.	
Foote v. Burnett.....	317	Lake v. Doud and others.....	415
Franklin Bank of Columbus v. Ohio.....	91	Landon v. Reid.....	202
G.		Larrowe and wife v. Beam.....	498
Gallaway, Farrington v.....	543	Lawrence v. McArter.....	37
Genin v. Grier.....	209	Leiby v. Wolf.....	83
Giddings & Merwin, Mathinet v.	364	Linn v. Ross & Co.....	412
Gilbreath v. Winter's Ex'rs.....	64	Lockwood v. Adams.....	397
Gillis and wife v. Weller.....	462	Longworth v. Flagg.....	300
Grier, Genin v.....	209	Lucas, Warner v.....	336
Gridley, Dodge v.....	173	M.	
Grummond v. The State of Ohio.	510	Mahon v. The State of Ohio.....	233
Gwynne, Cincinnati v.....	192	Mansfield v. McIntyre.....	27
H.		Marsh v. Reed.....	347
Harold, Anderson v.....	399	Mathinet v. Giddings & Merwin.....	364
Harris v. Clark.....	5	McArter, Lawrence v.....	37
Hawkins v. Hulburd.....	178	McCabe, Mitchell v.....	405
Hayward, Beach v.....	455	McIntyre, Mansfield v.....	27
Heffner, Case v.....	180	McMurchey v. Robinson and Kain.....	496
Herf & Co. v. Shultz and others	263	Meese and wife v. Keefe and others.....	362
Hettman, Ridley v.....	524	Miami Twp., Millcreek Twp. v...	375
Howard v. Whetstone Twp.....	365		

TABLE OF CASES.

v

McConnel, Hammer v.....	31	Sheriff of Pickaway County, Patton v.....	395
McCormick v. Alexander.....	65	Slaughter v. Hamm.....	271
McCullock's Heirs, Lessee of, v. Roderick, etc.....	234	Smith's Administrators v. Com- missioners of Licking County.	312
McCullock's Lessee v. Aten.....	307	Smith v. Loring.....	440
McFeely v. Vantyle.....	197	Smiley and Wife v. Wright and others	506
McGuire, Ely's Lessee v.....	223	Spencer's Lessee v. Markle.....	263
McVickar v. Ludlow's Heirs.....	246	Stevenson, Hastings v.....	8
Same v. Same.....	259	State of Ohio, Byers et al. v.....	106
McCutchen v. Keith.....	262	State ex rel. Sharp v. Trustees, etc	108
McArthur v. Thomas and others.	415	Steele et al. v. Worthington.....	182
Miami Exporting Company and others, Gilmore v.....	294	Steinberger et al, Sergeant and Wife v.....	305
Mors v. McCloud.....	5	Stuart, Fulton and Kirker v.....	215
Murphy v. Lucas.....	255	Stewart, Lamb v.....	230
		Starling, Executor, v. Buttles....	303
N.		Sterret v. Creed.....	343
Numlin, Administrator, v. West- lake.....	24	Strong and others, Este and Longworth v.....	401
		Stone, use, etc. v. Ruffin.....	503
P.			
Porter, Dawson's Lessee v.....	304	T.	
Patton v. Sheriff of Pickaway County.....	395	Tiernan v. Beam and others.....	383
Phelps' Lessee v. Butler.....	224	Thompson, Beggs v.....	95
Phillips, Loines v.....	313	Thompson v. Young et al	334
Pratt and Davis, Wood v.....	23	Thompson's Lessee v. Gibson and Jolley.....	339
		Thomas and others, McArthur v.	415
R.		Townsend v. Alexander.....	18
Reed v. Carpenter.....	79	Trustees etc., State ex rel. Sharp v.....	108
Reed, Barret v.....	409		
Ringer, Walsh's Lessee v.....	327	V.	
Robbins v. Budd.....	16	Vantyle, McFeely v.....	197
Roderick, etc., McCullock's Heirs Lessee of, v.....	234	Vancleve v. Wilson.....	202
Ruffin, Stone, use, etc. v.	503	Vance v. Bank of Columbus.....	214
S		W.	
Sergeant and Wife v. Stein- berger et al.....	305	Waldsmith's Heirs v. Adminis- trators of Waldsmith.....	156
Sayre, White's Lessee v.....	110	Walsh's Lessee v. Ringer.....	327
Sarchet v. Administrator of Sar- chet.....	320	Waddle and McCoy v. Bank U. S.....	336
Schultz, Bank U. S. v.....	471	Weaver, Duckwall and Wife v...	13
Shepherd, Baird v.....	261	Westlake, Numlin, Administra- tor v.....	24
Shaler's Lessee v. Magin.....	235		

White's Lessee v. Sayra.....	110	Wright v. Lathrop.....	33
Wilkinson's Lessee v. Fleming...	301	Wright v. Lepper and Ledley....	297
Wills v. Cowper and Parker.....	124	Wright and others, Smiley and	
Williams and others, Austin and		Wife v.....	506
Taylor v.....	61		
Williams et al., Crary v.....	65		
Wilson, Hartshorn v.....	27		
Wilson, Vancleve v... ..	202		
Wilson v. Holeman.....	253		
Wood and Beckelheymer v. Ar-			
cher.....	22		
Wood v. Pratt and Davis.....	23		
Worthington, Steele et al. v.....	182		

Y.

Young et al., Thompson v.....	334
-------------------------------	-----

Z.

Zimmerman, Duckwall and Wife	
v.....	23

CASES

DECIDED BY THE

Supreme Court of Ohio

IN 1825.

ORDERED TO BE REPORTED BY THE JUDGES.

MORS v. McCloud.

Declaration upon a common promissory note in the same form as upon a specialty is sufficient.

THIS case came before Judges PRASE and BURNET, by writ of error, at the April Term, 1825, in Gallia county.

The declaration was in these words, "Norman McCloud was summoned to answer unto James Mors, who sues, etc., of a plea of the case, for this, to wit: That the said Norman, on May 18, 1819, at Green township, in the county aforesaid, by his certain note of that date, duly executed, promised to pay the said J. Mors, or order, one hundred dollars, by the first day of October next succeeding said date, as by the said note to the court here shown appears. Yet the said Norman, although often requested, hath not paid the amount of said note, or any part thereof; but the

Mors v. McCloud.

same to pay he hath wholly refused, and still doth refuse, to the plaintiff's damage of three hundred dollars. Therefore he sues," etc.

6] *The defendant demurred generally. The court below sustained the demurrer, and gave judgment for the defendant.

The error assigned is, that judgment was rendered for the said Norman, when it ought to have been rendered for the said James.

DOUGLASS, for the plaintiff in error, contended :

That the note was sufficiently set out in the declaration—that the defendant was fully apprised of the plaintiff's claim—that the declaration gave him all the notice necessary to prepare his defense—that the special averments of indebtedness, liability, assumption, and request of payment, found in the old precedents, were useless, and increased the cost bill unnecessarily. He referred to Kid and Chitty, and a case decided in Massachusetts, in support of his declaration. He also referred to a case decided in Jackson county, by the Supreme Court, in which a declaration, taken from the same precedent, had been sustained.

KING, for the defendant, contended :

That the practice of Massachusetts was no guide for the courts of this state—that the doctrine in Kid and Chitty could not be sustained—that the mode of declaring on promissory notes, as on specialties, was condemned by the rules and principles of special pleading, and was contrary to the most approved precedents—that the only plea in its favor was indolence—that it would destroy distinctions useful and supported by immemorial usage—and that he knew of no case in which the question had been settled in the Supreme Court.

By the Court :

If this question were now presented for the first time, we should at least hesitate. The objections to this laconic mode of declaring, are not without their weight, but we consider the point as settled by our predecessors, and do not feel at liberty to disturb it. The judgment, therefore, must be reversed, and the cause remanded for further proceedings.†

†NOTE BY THE EDITOR.—Reaffirmed, iii. 368.

*THOMAS LACY v. THE ADMINISTRATORS OF GARRARD. [7]

Chancery.

Penal bond obtained from a person intoxicated, by procurement of the obligee, may be avoided at law. Equity can not interfere upon the ground of fraud alone, but only where the party shows good reason why defense was not made at law.

THIS case came before Judges PEASE and BURNET, at the May Term, 1825, in Hamilton county.

The bill states, that the complainant was fraudulently induced to sign a penal bond, as security for one Daniel Lacy. That his signature was obtained while he was intoxicated, by the procurement of Garrard. That having signed the bond as principal, he could not show, at law, that it was intended to be as security. That judgment was entered against him as a principal, and that he believes that Daniel Lacy, the real principal, on whom process was not served, has a good defense at law, consisting of several payments, of which complainant could not avail himself in the suit at law, and prays for a perpetual injunction.

The answer denies all the material averments in the bill.

By the COURT:

If the facts set out in the bill were admitted to be true, they would not entitle the complainant to the relief he asks for, as he might have taken advantage of them in the action at law. Had this signature been procured in the manner charged, the obligation would have been voidable at least. The facts might have been reduced to the form of a plea, and would have been a good bar to the action on the bond, or, if the payment had been made, as is alleged, they might have been pleaded or proved under a notice to the general issue. No reason is assigned why the complainant could not have taken advantage of them, much less is it pretended that he was prevented from doing so, by the fraud or procurement of the defendant. But independent of these considerations, the material facts are all denied, and the evidence is not sufficient to overthrow the answer. The testimony is vague

Hastings v. Stevenson.

and contradictory. It does not show that the complainant was intoxicated *by the procurement of the defendant*; nor is it pretended 8] that an *unsuccessful attempt was made to discriminate between the principal and the surety, in entering the judgment. This allegation seems to be an after thought, seized upon as a pretext to delay the collection of the debt. A part of the payments proved by the complainant, were deducted from the debt before the obligation was given; and it is proved that there were other dealings between the parties, to which the residue of those payments might have related, which is rendered probable by the absence of all proof tending to show that they were made with reference to the debt in question. The defendant's witnesses testify, that the bond was given for a part of the price of a tract of land, and that the residue of the price was paid by the delivery of the same kind of property that is spoken of by the complainant's witnesses. They also testify that the complainant and Thomas Lacy acknowledged that they both signed the instrument, so that the testimony taken together, rather confirms than contradicts the answer.

Injunction dissolved, and bill dismissed.†

HASTINGS v. STEVENSON.*Chancery.**Construction of entry.*

A survey did not so appropriate lands as to render a subsequent entry void, in cases that occurred before the passage of the act of Congress of 1807.

Land can not be appropriated without an entry, and where survey and patent include lands which the entry does not include, such land is subject to entry as vacant land, and the patentee, or those claiming under him, shall in equity be decreed to convey to the subsequent location.

Construction of entry.

THIS cause was heard at the May Term, 1825, in the county of Adams, before Judges PEASE and BURNET.

†NOTE BY THE EDITOR.—For late decisions in reference to remedy in chancery by the maker of a fraudulently procured contract, see xviii. 548, and cases cited. As to avoiding such contracts at law, see xvi. 504. As to defense of drunkenness in criminal cases, see xiv. 555.

Hastings v. Stevenson

The bill states that on August 3, 1787, an entry was made in the following words: "No. 459. Captain Churchill Jones enters one thousand acres of land, part of a military warrant 2,311, on the northwest side of the Ohio, beginning at the mouth of Brush or Eighteen Mile creek, running up the river fifty poles, thence from the beginning down the river five hundred poles when reduced to a straight line, thence at right angles from the general course of the river for quantity." That on March 17, 1792, the following entry was made: "No. 2,023. Thomas McClanahan enters two hundred acres of land, on a military warrant, No. 1,863, on the lower side of Brush creek, beginning at a poplar tree, marked J. B. 1791, on a branch one and a half miles from the mouth of Brush creek, running south thirty, *east two hundred poles, and from the beginning north thirty, west forty poles, thence southwardly at right angles for quantity, of which entry, one hundred acres were surveyed on August 19, 1809, for which a patent was granted to William Russell, assignee of J. Beasley, assignee of the said McClanahan, on November 23, 1818. That Russell sold and conveyed the said one hundred acres to the complainant, on March 4, 1819. That a survey purporting to be made on the aforesaid entry of Churchill Jones, but variant therefrom, was fraudulently made, including a part of the land owned by the complainant. That a certain N. Grimes acquired an assignment from Jones of the aforesaid one thousand acre entry, and fraudulently procured a patent therefor, prior in date to the patent of the complainant, but junior to the entry on which he claims. That John Stevenson, the defendant, having obtained a title from Grimes, for so much of the land as interferes with the prior equitable claim of the complainant, commenced an action of ejectment and recovered a judgment therefor.

The bill prays for a decree that the defendant withdraw, or relinquish to the complainant, and for an injunction.

The answer admits the entry in the name of C. Jones—averts that the same was legally surveyed on November 17, 1787—that the survey was recorded on March 17, 1788, that on October 28, 1799, a patent issued to Grimes—that the defendant has obtained a legal title to a part of said land, for which he recovered a judgment at law in an ejectment—that N. Grimes sold and conveyed that part of the land which the defendant claims to Thomas Grimes, who sold and conveyed the same to the defendant. The

Hastings v. Stevenson.

defendant admits the entry for two hundred acres in the name of McClanahan; but does not know whether it was special or legal, and that a part of it was withdrawn.

Several witnesses were examined, but their testimony did not cast much light on the subject.

ples.

THOMPSON, for the complainant, contended:

That an entry is notice to the world—that a survey is not—that if the survey varied from the entry, the land not covered by 10] *the entry was vacant until a patent issued, and that a survey does not prevent an entry.

BRUSH, for the defendant, contended:

That after a survey an entry can not be made—that Jones' entry is to be construed as calling for a base line of five hundred poles, including the fifty poles above the creek—that their survey is an amendment of their entry—that entries may be amended, and that the finding of the jury in the ejectment established the corners by which they have surveyed.

By the COURT:

The evidence in this case is not sufficient to enable us to make a final decree. The preliminary questions, however, on which the final decree must principally depend may now be stated:

1. It appears from the evidence, and the points conceded by the parties, that the entry of McClanahan, under which the complainant claims, was made agreeably to law; neither the sufficiency nor the notoriety of its calls has been disputed. Brush creek was generally known. The poplar marked J. B., 1791, called for as a beginning, is well described. The side of the creek on which it stands, its distance from the mouth of the creek, and its situation on a run being given, a subsequent locator, by reasonable diligence might find it. And the surveyor testifies that in tracing the survey he found all the corners as described in the complainant's deed, which appears to be a transcript from the patent.

2. As this entry was made in 1792, and the entry of Churchill Jones was not carried into grant till 1799, it is the opinion of the court that it covered and appropriated all the land embraced in its calls, not included in the calls of Jones' entry. The fact that

the survey of Jones was made before the entry of McClanahan, does not affect the case, as the entry was made long before the passing of the statute that prohibits locations on lands previously patented or surveyed. We admit that entries may be amended, but not that a survey is necessarily such an amendment of an entry as will appropriate land clearly without the calls of that entry, in opposition to a subsequent location. Were *this the [11 case lands might be appropriated by a survey without a previous entry, notwithstanding the express requirement of the statute of 1779. It has, however, been settled by the Supreme Court of the United States in the case of *Wilson v. Mason*, that a survey not founded on an entry is a void act, and constitutes no title whatever; and that consequently the land so surveyed remains vacant and liable to be appropriated by any person holding a land warrant. The principle here decided seems to settle this question; for if an entry must precede a survey, the entry must cover the land surveyed, and every part of it, or a portion of it, would be appropriated without an entry. If any portion of the land, however small, may be legally appropriated without an entry, we see no reason why an entire tract may not be taken up in the same way. If the holder of a warrant may enter one thousand acres, and in surveying vary so far from his entry as to include one hundred acres not covered by it, he might, on the same principle, take one acre within and nine hundred and ninety-nine acres without its calls, or, as was the case in *Wilson v. Mason*, enter on one watercourse and survey on another.

The terms used in the entry of Churchill Jones are somewhat ambiguous; but we believe the true construction of it will give a base on the Ohio of five hundred poles, including the fifty poles above the creek. The mouth of the creek appears to be adopted merely as an object from which to ascertain the beginning corner, which is a point fifty poles above the mouth.

The words of the entry are: "Beginning at the mouth of Brush, or Eighteen Mile creek, running up the river fifty poles; thence from the beginning down the river five hundred poles, when reduced to a straight line." The word "thence" must refer to the termination of the fifty poles, and consequently the five hundred poles called for must commence at that point. The most natural construction of the language is, running up the river fifty poles, and from thence, as a beginning, down the river five hundred

Duckwall v. Weaver.

poles, etc. The same result will be had by a simple transposition of the words *thence* and *from*.

On the whole, we are of opinion that the true construction of 12] Jones' entry requires it to be surveyed by beginning *at a point on the bank of the Ohio fifty poles on a straight line above the mouth of the creek, and by running from that point, as a beginning corner, down the river with its meanders, to a point on the bank of the Ohio five hundred poles on a straight line from the beginning course, and from those points at right angles from the base line so far as to include the quantity of one thousand acres, the opposite lines being equal and parallel.

It is contended by the complainant that the survey heretofore made on this entry, extends further back from the river than the calls, as now construed, justify, *and that it has been run* so as to include a part of the land contained in his entry. On this point it is the opinion of the court that so much, if any, of the land included within the calls of McClanahan's entry and survey as has been covered by the survey and patent of Jones, but not included within the calls of his entry as now expounded, has been fraudulently recovered from the complainant, and that in equity and good conscience the defendant ought to release the legal title he has acquired to it by obtaining the elder patent. But as no survey has been made of Jones' entry, on the principles here laid down, whereby the interference, if any, can be ascertained, it is ordered that the surveyor of Adams county execute a survey of that entry agreeably to the directions herein given, and return the same to the clerk of this court.

13] *DUCKWALL AND WIFE v. WILLIAM WEAVER.

Error.

When a subscribing witness to a writing denies his signature, other witnesses may be called to prove the execution of the writing.

A note partly destroyed may be declared on as entire, and proof received of the destroyed part.

THIS case came before Judges PEASE and BURNET in Clermont county, at May Term, 1825.

Duckwall v. Weaver.

The facts are these : Weaver instituted a suit against Duckwall and wife, on a note purporting to have been executed by the wife when sole. The defendant filed the following affidavit: "David Duckwall, being sworn, saith that the promissory note on which the above action was brought was not subscribed by the wife of the defendant, when sole, as he verily believes." No plea was filed in the cause at the trial, a part of the note set out in the declaration containing the name of the subscribing witness was offered in evidence, accompanied with proof that the note had been torn, and a part of it lost by accident. John Carrel, whose name appeared on the note, as a subscribing witness, was also called, who denied the signature to be his. The plaintiff then offered witnesses to prove that the name of John Carrel, on the paper offered, was the proper handwriting of the said John Carrel. The defendants objected to the whole of the evidence offered; the objection was overruled, and a bill of exceptions taken. A verdict was found for the plaintiff. Judgment entered, and a writ of error taken.

The errors assigned were: 1. "The court erred in admitting testimony to prove the handwriting of the subscribing witness."

2. "The court erred in permitting *a part of the note* to be given in evidence, when the same was not so declared on."

By the Court :

It is a general rule that the best evidence the nature of the case admits of, and that is in the power of the party, shall be produced. Deeds and other instruments of writing are therefore ordinarily to be proved by the subscribing witnesses.

The rule, however, admits of exceptions, as where the witness is dead, absent, incapacitated, or can not be had. In these cases inferior testimony is received, from necessity, *to prevent a [14 failure of justice. In *Lee v. Ballard Hill*, 1790, M. S., it was ruled by Lord Kenyon, that where there could be no direct proof of the execution of the bond, *by the subscribing witness*, collateral evidence was admissible. In *Abbot v. Plumbe*, Doug. 216, Lord Mansfield observed that it had been doubted formerly, whether if the subscribing witness denies the deed you can call other witnesses to prove it, but that it had been determined by Sir Joseph Jekyl, in a case which came before him at Chester, that in such case other witnesses might be examined, and that it had often been done

Duckwall v. Weaver.

since. The same doctrine will be found in Peake's Evidence, 101, 102.

The admission of such testimony can not be considered as interfering with the rule, which prohibits a party from impeaching the credit of his own witnesses, for the witnesses subsequently called do not directly discredit the first witness. They do not testify as to his character, and the impeachment of his credit, if any ensues, is indirect and consequential. The witnesses who were objected to in this case, and admitted by the court, were called to prove a fact that was important in the cause, and although the first witness had proved that fact contrary to the expectation of the plaintiff, that circumstance could not prevent him from proving how the fact really was by other witnesses; and if the feelings or character of the first witness were in any way affected, it was the unavoidable consequence of the exercise of a legal right by the plaintiff. The scope of the rule just referred to seems to be to protect a witness from any direct attempt that may be made by the party who called him, to destroy his credit by general evidence; and one reason for the rule is that such a license would put it in the power of suitors either to sustain or destroy their witnesses, as their testimony might operate for or against them.

If the plaintiff in error be correct in the position he has taken, there must, in many cases, be a total failure of justice. Persons who sign their names to instruments as witnesses, frequently lose all recollection of the fact, and sometimes their handwriting changes so much, as to induce them to doubt or even deny their own signature, when examined *after a lapse of years; and it sometimes happens that a witness from corrupt motives will knowingly falsify the truth, by denying his signature. To say, in cases like these, that a party shall be concluded, would be a sacrifice of substance to form. The rule we conceive does not require such a rigid construction. If the subscribing witness can be had, he must be produced. If when produced, he can prove the execution of the instrument, his evidence is that which the law requires, as it is the best in the power of the party, but if he can not identify his signature, he is, as to the party producing him, as though he was absent, or dead. The fact to which he is called remains unproved, and the party may resort to secondary evidence. We believe this to be the common sense of the rule, and the settled construction of it.

The second assignment is that the declaration does not describe

Robbins v. Budd.

the note as mutilated and partly lost. This objection seems to have a reference to the rule laid down for declaring on deeds, of which the defendant has a right to oyer, and of which the plaintiff is therefore required to make profert. In these cases, when the deed can not be produced, the plaintiff may excuse himself from making a profert, by averring that the deed has been lost, by time and accident. In the case before us, it appears that a part of the note had been destroyed, and the objection was, that that fact had not been set out in the declaration. There is no analogy between this case, and those in which that averment is required. In an action on a promissory note, the defendant not being entitled to oyer, a profert is not necessary, nor is it necessary to set out the note in the declaration—it may be given in evidence on the general counts—its mutilated state, therefore, need not be described in the pleadings. It is time enough to disclose that fact, and to account for it, when the paper is offered in evidence.†

*JOHN ROBBINS v. WILLIAM BUDD.

[16

Trespass on the Case.

A person fined before one justice for profane swearing, and arrested and brought before another justice for the same offense, can only prove the former conviction by a transcript from the docket of the justice who assessed the fine.

THIS cause came before Judges BURNET and SHERMAN, at the August Term, 1825, in the county of Delaware.

The declaration contained three counts. The first stated, in substance, that William Robbins was a son and servant of the plaintiff in his employ; that the defendant, being a justice of the peace issued his warrant against the said William, caused him to be unlawfully arrested, fined him in the sum of three dollars, and imprisoned him, whereby he lost the benefit of his labor. The second count charged the arrest to have been made with force and arms.

†NOTE BY THE EDITOR—Remedy on lost negotiable instruments, see xv. 242, and cases cited. As to proofs by subscribing witnesses, see ii. 56; iii. 42; vii. 116, part 1.

Robbins v. Budd.

The third count charged the defendant with having caused the said William to be illegally arrested on a charge of swearing several finable oaths—that the said William had before that time been legally fined for swearing the same oaths—that the defendant knowing the premises caused him to be fined a second time, and to be imprisoned for the same offense, by which he lost, etc.

Plea, general issue and notice.

In support of the declaration the plaintiff gave in evidence a certified transcript from the docket of the defendant, from which it appeared that William Robbins had been charged on oath before the defendant, as a justice of the peace, with having sworn two finable oaths, on which charge the said William was arrested, brought before the defendant, fined one dollar and cost of suit, and for non-payment of the fine was committed to prison.

B. Cook testified that he was a justice of the peace, that on the evening of the third of July, William Robbins, son of the plaintiff, swore two finable oaths in his presence, that he informed him at the time that he should take notice of it. That in the course of the evening he made an entry on his docket that said William was fined fifty cents for swearing the said oaths.

On cross-examination he stated that no process had issued and that no cost had been taxed. That after he had fined the said 17] William, the constable came and took him on a *warrant from Justice Budd, and that he requested the constable to tell Esquire Budd what he had done.

J. Cook testified, that he heard William Robbins swear, and heard B. Cook tell him he would take notice of it. He saw the constable arrest young Robbins on the warrant from Budd; that he was called as a witness before Budd—that he proved the swearing of the oaths, and that he informed Budd, that B. Cook had fined Robbins before, for the same oaths. On cross-examination, he stated that no transcript was produced from the docket of B. Cook, and that the defendant Budd had no knowledge of the fine imposed by Cook, but the verbal information given by the witness.

On this evidence the plaintiff rested, and the defendant moved for a nonsuit.

By the Court:

The declaration charges that the defendant was a justice of the peace—that as such he issued a warrant against William Robbins,

Townsend v. Alexander.

son of the plaintiff, for an alleged violation of the act for the prevention of certain immoral practices. That the said William had been previously fined for the same offense—that the defendant with a knowledge of that fact unlawfully fined him a second time, and caused him to be imprisoned, whereby the plaintiff lost the benefit of his labor. In support of the motion it is contended, that these facts have not been proved. The only averment tending to subject the defendant to his action is his knowledge that the party accused had been previously fined for the same offense. The declaration does not state the manner in which the defendant acquired that knowledge, but it appears from the testimony, that it was by a verbal message, sent by Justice Cook, which message the defendant very properly refused to receive as evidence. It was the duty of the accused, if he wished to avail himself of that defense, to do it by a certified transcript from the docket of the justice who had imposed his fine. Parol evidence of the fact was inadmissible. If the suit had been brought in a court of record, and the defendant had plead a former conviction in bar, he could not have sustained that plea by parol testimony, but must have produced the record of the conviction. *Although the pleadings before the justice [18 are *ore tenus*, the rules of evidence are the same as in courts of record, and the defendant, acting as a judicial officer, was bound to require the best evidence in the power of the party, and to reject that which was inferior. The plaintiff not having shown that such evidence was produced, has failed to prove the only fact on which he could hope to sustain his action—we therefore advise him to submit to a nonsuit.

Judgment of nonsuit.†

TOWNSEND v. ALEXANDER.

Chancery.

Where party seeking specific performance of a contract insist upon obtaining unconscionable advantage, court will dismiss his bill.

THIS case came from before Judges PEASE and BURNET, at June Term, 1825, in Warren county.

†NOTE BY THE EDITOR.—Justices' Records, see H. 180; v. 545; ix. 131; civ. 91.

Townsend v. Alexander.

The facts are these: The defendant contracted to sell to the complainant a house and lot in the town of Springborough, on the complainant's paying for the same two hundred and forty dollars in the following manner: Twenty dollars to be paid on a day named; one hundred dollars to be paid on a subsequent day; one hundred dollars to be paid by assigning notes on good men; and in discharge of the residue the complainant was to convey five unimproved lots in Springborough. The first and second installments, amounting to hundred and twenty dollars, were paid. In discharge of the third installment the complainant offered to assign promissory notes on different individuals to the amount of one hundred dollars. The defendant objected to the sufficiency of a part of the notes, amounting to seventy-one dollars and forty cents, but was willing to receive the residue, amounting to twenty-three dollars and sixty cents. Complainant refused to assign a part without the whole. Defendant then instituted a suit before a justice of the peace, for the whole amount of the third installment. The justice, mistaking the extent of his power, gave judgment 19] that the defendant in the suit before him, should pay *the plaintiff the sum of seventy-one dollars and forty cents, being the amount of notes objected to, and ordered him to assign to the plaintiff the residue of the notes, to which no objection had been made, amounting to twenty-three dollars and sixty cents. The complainant refused to assign the notes, but offered to pay the seventy-one dollars and forty cents, and to execute a deed for the five lots in Springborough. The prayer of the bill is that the defendant may be decreed to convey the house and lot.

On the part of the complainant it was contended that the recovery before the justice was a judicial determination of the amount due on the contract. That the order relating to the assignment of the notes was a nullity, and not obligatory; but if otherwise, that the defendant had his remedy. That this court can not overhaul the merits of that judgment, which was rendered in a suit, in which the entire claim of the defendant was exhibited.

By the Court:

The facts in this case are not disputed. The contract is admitted, and the performance by the complainant as far as it is alleged in the bill. The only point of controversy is whether the defendant shall lose twenty-three dollars and sixty cents, part of the third

installment, in consequence of the erroneous opinion of the magistrate, as to the kind of judgment or decree he was authorized to enter. It is evident, and in substance admitted by the complainant, that the third installment of one hundred dollars, was wholly unpaid when suit was commenced before the justice, and that judgment was rendered for a less sum than was due, in consequence of a belief that the justice had power to compel an assignment of a part of the notes. Although it is not in the power of this court to interfere with the judgment of the magistrate; yet it is in their power to require the complainant to do equity, as the only condition on which they will render him their aid. We can not shut our eyes on the fact, that the complainant is seeking an unjust advantage of the defendant, and that if the prayer of his bill should be granted, he will obtain the property at a less sum than he stipulated to pay. He may claim the *advantage he has [20 gained at law by refusing to assign the notes, or to pay more than the amount of the magistrate's judgment, but while he does so we will leave him to his remedy at law. Before he has a right to ask equity he must do equity. He must come with clean hands, if he expects to obtain the aid of this court. As the case now stands, we are called on to decree him a title under such circumstances as must forever prevent the defendant from obtaining a part of the consideration. The complainant does not pretend that the sum for which the magistrate directed notes to be assigned has been paid, and he still persists in his refusal to pay it. We have no alternative, therefore, but to dismiss his bill.

†NOTE BY THE EDITOR.—When chancery will enforce specific performance, see i. 124; ii. 221, 341; iii. 335; v. 204, 425; vi. 383; vii. 84, part 2; viii. 198; x. 215; xii. 355; xvii. 27. When not, i. 14, 429; ii. 383; vi. 528; vii. 73, part 2, 90, part 2; viii. 198; ix. 189; x. 305, 382; xi. 109; xii. 1, 193; xiii. 552; xiv. 547.

M'Carty v. Burrows.

BENJAMIN M'CARTY v. CHARLES BURROWS.

Chancery.

Where a matter of fact, properly a subject of defense at law, is not litigated at law, equity does not relieve by an examination into that fact.

THIS cause was heard before Judges PEASE and BURNET at the June Term, 1825, in the county of Warren.

The bill states, that defendant being about to go to New Orleans, and having a sum of money on hand in current bank notes, for which he had no immediate use, proposed to lend them to complainant, to be refunded on his return from New Orleans. That the complainant took the bank notes, and gave his own promissory note for the amount—that after the defendant had returned, the complainant called on him and told him that the notes did not answer his purpose—that he could not pay his debts with them, and offered to return them—that the defendant agreed to take them back, and give up the promissory note which he held—that complainant then gave him the bank notes, on which the defendant promised to destroy the promissory note, which was not at that time present—that relying on the integrity of the defendant he took no receipt, and had no witnesses by whom he could prove the payment—that the defendant, instead of destroying the note, commenced an action on it, recovered judgment and had sued out execution.

21] *The prayer of the bill is for a perpetual injunction. The answer admits the loan of the money—the promissory note—the judgment and execution; but denies the repayment, and avers that the debt is just and that it is wholly unpaid.

Two witnesses were examined on the part of the complainant. The first testified that he heard the defendant say he had received the bank notes from complainant, and had promised to destroy the promissory note. The second testified that he was present at a conversation between the parties, when the defendant made the same admission. On the part of defendant testimony was offered as to the general character of the first witness, and the cause was submitted.

Wood and Beckelheymer v. Archer.

By the COURT:

There is no ground on which this bill can be sustained. The credibility of the first witness is entirely destroyed. Independent of the proof as to his general character, he has equivocated, and told different stories at different times. His evidence, therefore, is entitled to no weight. The second witness contradicts one of the allegations of the bill, that complainant had no witness by whom he could prove the payment of the money.

The material averments of the bill are positively denied by the answer, which is responsive, and is not impeached.

The remedy of the complainant, admitting the truth of his allegations, was at law. The whole contest between the parties is a matter of fact, relating to the payment of a sum of money, of which the complainant might have availed himself in the action on the promissory note, and if the second witness testified truly, of which there is great doubt, McCarty knew by whom he could prove the confession of the payment. But be this as it may, the case is not within the jurisdiction of this court. Putting the answer out of the question, the complainant has not presented a case that can be sustained. It might have been necessary for him to file a bill of discovery, pending the suit at law, but having submitted to a judgment in a case depending wholly on a contested fact, he can not review the merits of that judgment in a court of chancery.

The injunction must be dissolved, and the bill dismissed.†

*WOOD AND BECKELHEYMER, ADM'RS, v. CHAPMAN ARCHER. [22

Chancery.

Case not relievable in equity.

THIS cause was heard at the May Term, 1825, in the county of Clermont, before Judges PEASE and BURNET.

†NOTE BY THE EDITOR.—The doctrine of this case is recognized in ii. 22, 23; iii. 278; viii. 43; xiii. 107.

Duckwall v. Zimmerman.

The bill states that after the complainants had taken out letters of administration, an allowance of one hundred and ninety-five dollars was made for the support of the widow and children of the intestate for one year, agreeably to the statute. That a contract was afterward entered into, between the complainants and the widow, that she should receive thirty-nine dollars for her own support, and that they should receive the residue and support the children, which was done. That the defendant was appointed their guardian, and in that character commenced a suit against the complainants, before a justice of the peace, for the money received by them under the agreement aforesaid, and recovered a judgment; that the complainants then gave notice of an appeal, after which an agreement was entered into, that the complainants should relinquish their appeal, and the defendant should amicably and honestly settle the matter; but that after the time for presenting the appeal had expired, the defendant refused to settle.

The answer denies the material averments of the bill.

The cause having been submitted on bill and answer, the following points were decided by the court:

1. The claim of the complainants was a proper defense to the suit at law.
2. The promise to settle or relinquish the appeal was made on a good consideration, and may be investigated in an action at law.
3. The bill does not present a case that could be sustained in equity, if the facts were all admitted; but as they are principally denied, and no evidence is offered, the injunction must be dissolved and the bill dismissed.

23]

*DUCKWALL AND WIFE v. ZIMMERMAN.

Chancery.

Case not relievable in equity.

THIS cause was heard before Judges PEASE and BURNET, at the May Term, 1825, in the county of Clermont.

The bill stated that suit was commenced against the complain-

Wood v. Pratt and Davis.

ants on an instrument, purporting to be a note executed by Kitty Ann, now the wife of the complainant Duckwall, while a *feme sole*. That the defendants in the suit at law, believing that the plaintiffs must prove the execution of the note, did not attend, and that judgment was entered against them. They deny the execution of the note, and pray for a perpetual injunction.

The defendant demurred. The cause was submitted without argument.

By the COURT:

There is no ground on which this bill can be sustained. It does not contain one feature of a case proper for, or relievable in this court.

The injunction must be dissolved and the bill dismissed.

J. WOOD v. PRATT AND DAVIS.

Chancery.

Case not relievable in equity.

THIS cause was heard at the May Term, 1825, in Clermont county, before Judges PEASE and BURNET.

The bill states that the defendant, Davis, being a justice of the peace, entered a judgment on his docket against the complainant in favor of S. Pratt, for upward of eighty dollars; that he was not served with process, and had no knowledge of the suit till after judgment had been rendered and execution issued, and prays for a perpetual injunction.

The answer admits the judgment and execution, and avers that complainant had notice of the suit before the justice—that he appeared at the trial and admitted the debt to be just, on which judgment was entered against him.

*The cause was submitted on bill and answer.

[24

By the COURT:

Let the injunction be dissolved and the bill dismissed.

 Numlin v. Westlake.

N. NUMLIN, ADM'R OF JANE SCOTT, WHO SUES FOR THE USE OF
R. WORKMAN, v. SAMUEL WESTLAKE.

Error.

Where a suit is brought in the name of a plaintiff for the use of a third person named, it is not necessary to show an assignment of the subject of the action to such third person.

THIS cause came before Judges Pease and Burnet, at the April Term, 1825, in the county of Gallia.

It appeared, from the record, that a *certiorari* had issued from the common pleas of Gallia to John Kerr, a justice of the peace, who returned the same with a transcript annexed, from which it appeared that a summons issued in the name of Jane Scott for the use of Workman, against Samuel Westlake, which was returned served. That defendant appeared and confessed judgment for twenty-one dollars and cost. That sundry executions had been issued by the justice, on which no property was found. That the proceedings before the justice had been stayed by an injunction which was afterward dissolved. That the justice then issued a summons on the injunction bond, in the name of Scott, for the use of Workman, against the defendants, Samuel Westlake and his securities. That the defendants appeared, made no defense, and that judgment was entered by the justice for the penalty of the bond, to be released on the payment of twenty-eight dollars and forty-seven cents.

After the return of this transcript diminution was suggested, and a further return obtained, setting out the original note, on which the suit was brought. It did not appear from the note that it had been assigned to Workman. Pending the *certiorari*, Jane Scott died, and N. Numlin, administrator, was made party. The following reasons were assigned on the *certiorari* :

1. "The suit was brought in the name of Jane Scott, and the judgment was rendered in the name of Jane Scott, for the use of Workman."

25] *2. "It does not appear that Workman had any interest in the note on which suit was brought, as there was no assignment

Numlin v. Westlake.

or order by Jane Scott to Workman for the payment of the same to him."

3. "The judgment does not agree with the writ."

On these reasons the court of common pleas set aside the judgment of the justice, and rendered judgment against the defendant in *certiorari* for cost, to reverse which this writ of error was taken.

The error relied on is, that the court of common pleas set aside the judgment of the justice, and rendered judgment in favor of plaintiff in *certiorari*.

By the COURT:

The assignment in this case renders it necessary to examine the reasons filed in the court below.

The first and third reasons are not true in point of fact. The transcript shows that the original summons issued in the name of Jane Scott, for the use of Workman, and that there is no disagreement between the writ and judgment.

The second reason does not seem to be very material. As the note was not assigned, the suit was properly brought in the name of the payee. The additional words, for the use of Workman, were intended to show that he had a right to receive the money when it should be collected. The want of an assignment, or an order on the back of the note, does not disprove that right. It might have been created by a separate instrument, or a parol agreement, the validity of which could only be questioned by the payee. It is a matter of no interest to the defendant to whom the money belongs; it is enough for him to know, that the title to the note is in the plaintiff, in whose name the suit was brought, and that a second action can not be sustained against him for the same demand.

It is a common practice in the courts of this state to designate in this way the person for whose benefit a suit was brought, when it is necessary to commence it in the name of the original obligee or payee, and it has been considered a sufficient authority from the nominal plaintiff to justify the officer in paying the proceeds of the judgment *to the person designated, where no [26 objection is made. It has been treated as an acknowledgment, by the plaintiff, that he was a trustee, suing for the use of another, and it appears unnecessary to inquire in what way the trust was

Knaggs v. Conant.

created, as long as the trustee is disposed to acknowledge it, and the interest of third persons is not affected by it.

On these grounds we are of opinion that the court of common pleas erred in setting aside the judgment of the justice.

Judgment reversed, and cause remanded for further proceedings.

WHITMORE KNAGGS *v.* HORATIO CONANT.

Chancery.

Where a cause is certified to the Supreme Court from the court of common pleas, upon account of the interest of the judges, the facts upon which the interest arises must be set out in the certificate.

THIS cause came before Judges BURNET and SHERMAN, at the August Term, 1825, in the county of Wood.

It was certified to this court from the court of common pleas on the ground that there was not a constitutional quorum of disinterested judges to try it. The certificate accompanying the record was in these words: "Whereupon this cause being called by the honorable court in chancery, E. Lane, Esq., solicitor for the defendant, suggests that there is not a quorum of judges qualified to try this cause on account of interest, and this appearing, the clerk of our said court, according to the statute in such case made and provided, certifies the pleadings to the Supreme Court."

The court, having inspected the record, refused to take cognizance of the cause for want of jurisdiction, and ordered the transcript to be sent back to the common pleas of Wood county.

By the COURT:

The statute provides, that if any suit or action in the court of common pleas, it shall so happen that there is not a sufficient number of disinterested judges of such court to sit on the trial, it shall be the duty of such court, on the application of either party, to cause the facts to be entered on the minutes of the court, and also to order an authenticated copy thereof, with all the proceedings in such suit or action to be forthwith certified to the next Supreme

Hartshorn v. Wilson.

Court *of the county, which Supreme Court shall thereupon [27 take cognizance thereof, in like manner as if it had been originally commenced in that court, and shall proceed to hear and determine the same accordingly. The jurisdiction of this court, therefore, depends on the existence of an interest in the court below, which must be ascertained by the record. The law requires the facts, from which this interest is inferred, to be entered on the minutes and certified to the Supreme Court with a transcript of the proceedings. We are not to rely on the opinion of the court of common pleas, or of counsel in the case, that there is not a constitutional quorum of disinterested judges. We must be furnished with record evidence of the facts from which that conclusion is drawn. Judges and lawyers frequently differ as to what amounts to evidence of an interest, and, as our jurisdiction depends on the reality of such an interest, we must be furnished with the facts, and form an opinion for ourselves. In this case it does not appear what the facts were, or that the common pleas directed any entry or certificate to be made. It is merely stated that, on the suggestion of counsel, the clerk certifies, etc. On such a certificate as this we can not venture to proceed, as it does not furnish us with evidence from which we can ascertain that we have jurisdiction. The letter and spirit of the statute requires that the courts below should ascertain the truth of the facts, from which the interest of the judges is inferred, and that they order those facts to be entered on their minutes, and certified, with a copy of all the proceedings, to this court.

HARTSHORN v. WILSON.*Error.*

Attachment before a justice of the peace may be set aside on *certiorari*, upon proof that the defendant was not a non-resident at the time it issued.

THIS cause came before Judges BURNET and SHERMAN, at the August Term, 1825, in Sandusky county.

The facts were these: Hartshorn having made affidavit of a debt due from Wilson, and that he absconded to the injury of his cred-

Hartshorn v. Wilson.

itors, sued out an attachment before a justice of the peace, by virtue of which the constable to whom it was directed attached a yoke of oxen. Judgment was afterward entered in favor of plaintiff, 28] and execution issued. *Wilson removed the proceedings to the common pleas by *certiorari*, and assigned for error that before and at the time of suing out the writ of attachment, he was living and residing in the said county of Sandusky, and that from the day of the suing out of the writ until the rendition of the judgment he was constantly within the county at his usual residence, pursuing his ordinary business.

The defendant demurred. The court below sustained the assignment and set aside the judgment of the justice, to reverse which the writ of error was brought. The error assigned was that the court of common pleas erred in setting aside the proceedings and judgment of the justice.

The cause was submitted without argument.

By the Court:

The question presented in this case is, whether the plaintiff in *certiorari*, against whom judgment has been entered, on a writ of attachment, issued by a magistrate can assign for error the fact that he was a resident of the county where the writ issued, and had not absconded, as was averred in the affidavit on which the attachment issued. The writ of attachment is given by statute, and can be issued only against absconding debtors, or such as do not reside within the county; for convenience, or from the necessity of the case, the justice is authorized to receive the affidavit of the creditor, that his debtor absconds, or is a non-resident, and on that evidence to issue the writ, but the legality of the process depends on the fact, and not on the affidavit, which is received as evidence of the fact. The process against a resident must be a summons or *capias* on which personal service is required—he must have a day to answer before judgment—he is entitled to a stay of execution, and his property is not liable to be taken in the first instance as in case of an attachment. The statute makes this distinction, and it is not in the power of a creditor, by perjury or mistake, to do away its legal obligation, or the right of the debtor to insist on it. Process may issue by mistake, and proceedings on it be sustained until the mistake is judicially ascertained; but whenever that is done, the party injured is entitled to relief. Individuals are not at

Hartshorn v. Wilson.

liberty to change *the law, or by fraud, or mistake to create [29 a jurisdiction, not known to the law; and when such an attempt is made, the proceeding can not be sustained after the truth is judicially known. An attachment founded on an affidavit taken in conformity with the statute, must be considered *prima facie* as legal, and will sustain the writ and the proceedings had on it; but as this mode of proceedings is not authorized against a resident who does not abscond, whenever it is ascertained that the defendant is a resident of the county and has not absconded, proceedings must be stayed. The remedy by attachment being founded on the alleged absence of the defendant, personal notice is not required; the proceedings are *ex parte*—the defendant has no day in court; judgment may be obtained and his property sold without his knowledge and before it is in his power to take advantage of the error. It seems necessary, therefore, to prevent abuses of legal process in cases like this, that the party injured should be permitted to assign the fact for error, on a writ of *certiorari*; and we do not discover anything in the practice, inconsistent with the principles which govern proceedings in the nature of appeals in other cases. On a writ of error, the plaintiff may assign for error matter of fact not apparent on the record, and put the defendant to take an issue, either on the fact or on the law, which seems to be the course pursued in this case.†

†NOTE BY THE EDITOR.—As to the absence of all the debtors in attachment cases, see also iv. 132, 149. *Certiorari* in attachment cases, see also ii. 202.

CASES

DECIDED BY THE

Supreme Court of Ohio

BEFORE ALL THE JUDGES,

AT A SPECIAL SESSION HOLDEN AT COLUMBUS, DEC., 1825.

HAMMER v. McCONNEL.

Process against two, one not served, declaration against one. Appearance and plea by one, verdict against both and judgment, may be amended at a subsequent term by striking out the name of defendant not served with process.

THIS case came before the court upon three separate motions, made in the Supreme Court for Tuscarawas county, and adjourned for decision to this court.

The case was this: Hammer brought an action for goods sold and delivered to John and Alexander McConnel, as partners in trade—process issued against both, but as to John McConnel, was returned not found. The declaration was filed under the statute suggesting the return of *non est* as to John—Alexander appeared and pleaded to the action separately, and in the court of common

Hammer v. McConnel.

pleas a verdict passed in his favor. The plaintiff appealed to the Supreme Court, where a verdict was found for the plaintiff. The verdict was returned as against both John and Alexander, and a joint judgment was rendered against both. At a subsequent term, the plaintiff moved for leave to amend the judgment by striking out the name of John McConnel. The defendant moved to set aside the verdict and judgment, as irregular, and award a *venire facias de novo*—and also, in the event this motion should be overruled, he moved for a writ of error *coram nobis*.

*WRIGHT, for the plaintiff, insisted :

[32

That the verdict and judgment being joint, was a mere clerical error, which might be amended upon motion. He denied the power of the court to set aside a verdict and judgment, at a subsequent term, and award a *venire facias de novo*. He also argued that the Supreme Court, not being specially authorized by statute to award a writ of error *coram nobis*, could not legally issue a process of that character.

TAPPAN, for the defendant, maintained :

That the verdict of the jury being against both defendants, it was not a clerical error, and could not be amended as such. In support of the power of the court, at any time to set aside irregular proceedings, he cited the language of Justice Ashurst, in *Rex v. Holt*, 5 Term, 444, and *Rex v. Teas*, 11 East, 307.

By the Court :

The verdict in this case is a substantial finding for the plaintiff. The issue was between the plaintiff and Alexander McConnel, and upon that issue alone the jury could decide. There is no difficulty in understanding how John McConnel was connected with the case, and it is perfectly easy to see how it happened that his name was included in the verdict. It was a mere formal error. When the clerk receives the verdict, it is always upon the terms, that the court may correct matter of form, not touching matter of substance.

The verdict against a party to the contract, but not a party to the suit, was an informality and nothing more. It was the duty of the clerk to record the verdict according to the parties at issue, and to have entered the judgment in the same way.

Wright v. Lathrop.

Had the mistake in the verdict been discovered as soon as the jury left the box, can there be any doubt but that the court would have corrected it, and directed a judgment conformable to such correction? We think there can be none. As a mere clerical error, it is still amendable. Leave is accordingly given to make the amendment. This decision concludes the other two motions; they must of course be overruled.†

33]

*E. WRIGHT v. J. W. LATHROP.

Verdict and judgment for damages against one joint trespasser can not be pleaded in bar to a separate action for the same trespass against another joint trespasser.

THIS was an action on trespass, with force and arms, for taking and converting goods.

The defendant first pleaded the general issue of not guilty; and, secondly, he pleaded that the plaintiff had prosecuted a separate action, for the same trespass, against one Asa K. Burroughs, in the Supreme Court of Portage county, and recovered against him a verdict and judgment for damages and costs. To this plea the plaintiff demurred, and the defendant joined in demurrer. The question of law thus presented upon the plea and demurrer, was adjourned from the Supreme Court of Portage county to this court.

WHITTLESEY, NEWTON, and SLOAN, for plaintiff:

It is a proposition universally admitted, that torts are in their nature joint and several; that the plaintiff may sue all the trespassers in one action, or may sue each of them in separate actions; and that each is liable for the acts of all. This being the case, it would seem to follow that a recovery alone, without satisfaction, would not be a bar to another action against a co-trespasser. If this is not the case, the proposition first laid down falls to the

†NOTE BY THE EDITOR.—Amendments of verdicts and judgments. See also iii. 486; v. 227, 514; vi. 274; i. 375; ii. 246; viii. 405; ix. 131.

Wright v. Lathrop.

ground; for it is in vain to admit a proposition to be true, and at the same time deny its necessary and irresistible consequences; one of which is, that, as the wrong at the time the suit was commenced (for it is not claimed that the commencement of the suit alone varies it), was a joint and several one, it necessarily continues so through all its various stages to final judgment and satisfaction; for execution is as necessary a part of the suit as the original writ. If a recovery alone be a bar, the consequences would be most injurious. Many known and established principles at law would be violated. The plaintiff might commence separate suits against each individual wrong-doer (as he has a right to do), and the suit which happened to be first tried might be pleaded by way of *puis darrien* continuance, which would necessarily involve the plaintiff in a bill of costs in each of the remaining suits. The doctrine that the plaintiff has an election *de melioribus damnis*, would be destroyed; for, as before observed, it is *not pre- [34 tended that the bringing of the suit against one is an election; therefore, it can not be said that a recovery of a verdict against one, and a judgment upon that verdict, is an election; for there must be more verdicts than one, in order to give the plaintiff an opportunity of an election.

The authorities in support of the demurrer, are 1 Johns. 289, and the authorities there cited; 3 East. 258. The same principle has been decided in Connecticut, and even carried further; that where a recovery was had against one, and his body taken in execution, and he swore out of jail under the poor laws, that was not a bar to an action against another. There are some old authorities, however, that stand opposed to this doctrine, and in these cases the court attempt to make a distinction between a contract when two or more are bound jointly and severally in an obligation (in which a recovery without satisfaction would be no bar), and a case sounding in tort, because, in contracts the damages were certain; but in tort, that which was uncertain is reduced to certainty. This reasoning we can not conceive to be correct, for, in a variety of cases founded upon contract, the damages to be recovered are as uncertain as those to be recovered in tort.

In support of the demurrer the plaintiff also relies upon the case of *Livingston v. Bishop* and others, 1 Johns. 290, where O. J. Kent has collected and considered all the authorities on the

Wright v. Lathrop.

point. Also, 2 Johns. 382; Mass. Dig. 601, 42; 1 Esp. N. P. 314 [420]; 1 Phillip's Ev. 32, n. 6; 83 Mod. 6; 2 Shower, 484; Hob. 66; Wm. Jones, 377; 3 Burrows, 1345; 3 East, 258; Morton's case, Cro. Eliz. 30; 2 Esp. 552; Johnson v. Brown, 1 Wash. 187; 3 Term, 27; 7 Term, 604.

WRIGHT, for defendant:

The statute of Ohio, vol. 14, p. 338, provides, that where several are jointly sued in trespass, and some are found guilty, and some not guilty, those acquitted shall recover costs, and may take several judgments.

Without such provision it is supposed the judgment would follow
35] *the writ and count, and be entire for plaintiff or defendant.

In actions upon contract a plaintiff can not enter a *nolle prosequi* as to one, unless for a matter operating to his personal *discharges*, without affecting the others, as bankruptcy and the like. 1 Tidd Prac. 632; 1 Wil. 89.

In torts the action is joint or several, at the election of the plaintiff or defendant. As, if the plaintiff elect to bring a joint suit against several for a trespass, the defendants are not bound to *unite* in their defense, so that each would defend for and guarantee the innocence of the whole, and be subject to the whole damage, if *any*, when found guilty. Such a rule would be manifestly unjust; yet without statutory aid they could not have had judgment for costs or execution. It is believed to be a universal rule in trespass that where the *defenses* are joint, and the damages several, the plaintiff may *elect to take a judgment* for the best damages. Doubts, however, are admitted to have arisen in the application of this rule to cases where the suit is joint but the pleas are several, and the *damages are severally assessed*. In such cases the better practice seems to allow the plaintiff to enter a *nolle prosequi* as to all the co-trespassers except the one against whom the best damages are assessed, and to take his judgment against that one only, thus completing his *election*. The rule is the same in cases where the plaintiff has brought *several* actions for the same trespass. The right to *elect* is the same; it is as to taking *judgments*, not as to taking *execution or satisfaction*. No adjudged case is recollected where this doctrine has been questioned, except in New York. The cases there, I shall hereafter examine, and be able to show, I trust, are predicated upon a misapprehension of the

DECEMBER TERM, 1825.

Wright v. Lathrop.

law. In torts against several, it is a general rule that the plaintiff may, at any time *before final judgment*, enter a *nolle prosequi* as to one, and proceed against the others, but a *nolle* can not be entered as to one *after judgment* against the others. 1 Tidd's Prac. 632; 2 Salk. 455; Noke v. Ingham, 1 Wils. 89; Shields v. Perkins, 2 Bibb, 229.

In trespass against two, one pleaded *non cul.*, and had a verdict against him; the other pleaded title to the goods in himself, which was found for him, but the court refused to **give judgment*, [36 it being one action, and the court apprised that the title was against the plaintiff. Buller's N. P. 94, cites Hobart, 54; 1 Levins, 63, S. P.

In Hill and Wesway v. Goodchild, Buller's N. P. 494, a *judgment* was taken against two for several sums, which was *reversed* on writ of error. See also 5 Burrows, 2790.

The plaintiff may enter a *nolle prosequi* when he comes to enter *final judgments*; and if he does not the defendants will have advantage of it on error. Tidd's Prac. 632, 805; Cro. Eliz. 806; Heydon's case, 11 Coke, 5.

In Dale v. Eyre et al., a rule was taken to *arrest* the judgment where several damages were assessed, which was discharged because the defendant came too soon, and did not know but that the plaintiff would correct the error by entering a *nolle*. 1 Wils. 306; Salk. 455, 456.

If several defendants sever in pleading, the jury who try the first issue should assess damages against *all*, with a *cessat executio*, and if the other defendants be found guilty they shall be contributory to the damages. 2 Tidd's Prac. 804; 2 Ld. Raym. 1372; Strange, 610, 1222; Bull. N. P. 20; Carthew, 19.

The form of the entry in such cases may throw some light on the law. It is, "and because it is convenient and necessary that there be but one taxation of damages in this suit, therefore let the giving of judgments in this behalf be stayed until the trial and determination of the issues joined between the said" A. B. etc. (the other defendants). 2 Tidd's Prac. 670.

It is laid down in Rastall's Entries, 654, that from the precedents it would seem where there are several defendants in a joint trespass and a verdict is had against one or more, if the plaintiff chooses to proceed against the rest, the regular course is to enter a *cessat executio* until trial is had of the others, and then elect against which of them he will take his *final judgment*, and enter

Wright v. Lathrop.

a *nolle* as to the rest. The case of *Crane and Hill v. Hummertone*, reported in *Croke James*, 118, was trespass against two. They severed in their pleadings, and a verdict and judgment was had against each. The case was taken up from the common pleas, on 37] a writ of error, and the error assigned *was, "because there ought to have been but *one judgment*, and the plaintiff ought to have made his election against *whom* he would have taken his judgment." The whole court was of opinion that as it was a joint trespass, *one judgment only* ought to have been, and that the judgment therefore should be reversed.

Rodney v. Strode, Carthew, 19, was trespass against three. One of the defendants confessed, and the other two pleaded jointly not guilty. A verdict was taken for plaintiff for one thousand pounds as to one and fifty pounds as to the other. The plaintiff entered a *nolle* as to him who confessed and for the fifty pound verdict, and took judgment against one only for one thousand pounds. The court held that the defect in the finding was cured by the *nolles*, for as the plaintiff might sue *jointly* or *severally*, he should have the *same election* as to damages. This judgment was affirmed in the exchequer chamber and in the House of Lords.

The court determined, in *Cooke v. Jenner, Hobart*, 66, that if a trespass be joint, a release to one is good for all, for though several are concerned, yet it may be sued against one or all, for all are principals, and each answerable for his fellow; and as there can be but one satisfaction, a release to one is good to all.

The same court determined in the case of *Parker v. Sir J. Lawrence, Hobart*, 70, on the same ground, that if the plaintiff brings a joint action of trespass, and the defendants sever in their pleas, and one is tried and found guilty and damages are assessed, the plaintiff may enter a *nolle* as to the others and take judgment.

The case of *Mitchell v. Millbank et al.*, 6 Term, 199, was trespass for assault, etc., against three, who made default. The plaintiff executed three writs of inquiry, and the jury assessed several damages. Defendants moved in arrest of judgment that there could not be *several damages*.

Lord Kenyon, Chief Justice, says the plaintiff's proceedings are certainly irregular; he has executed three writs of inquiry when one would have been sufficient; and if he had entered up *final judgment* it would have been *erroneous*; but he has discovered his mistake in time, and, upon payment of costs, he may set aside his

Wright v. Lathrop.

own proceedings, but there *is no ground to *arrest* the judgment. [38] The judge says further, that it appears in the case cited from *Strange*, which is a very *loose note*, that the jury assessed several damages against the defendants. He also cited *Rodney v. Strode*, Carthew, 19, as authority. See also *Esp. Dig.* 321.

Sabin v. Long, 1 Wils. 30, was also trespass against three. Two pleaded and the other suffered a default. On the issue the jury found a verdict for plaintiff for thirty-five shillings. Afterward the plaintiff executed a writ of inquiry on the default, and the jury assessed separate damages, and *judgments were entered on both*. The plaintiff now moved that the second damages be struck out, and for judgments against all three for the first assessments. The motion was overruled because it was moved *after judgment*, and the court said a plaintiff could take judgment *de melioribus damnis* where several damages are given or enter a *remittitur*; but taking judgment for the whole makes the judgment bad in law, and it can not be amended, for it is no misprision of the clerk.

Sir John Heydon's case, 11 Coke, 5, is one frequently cited and relied upon as a leading case; and although the court in *Hill v. Goodchild*, 5 Burrows, 2790, say it is confused and doubtful, and not law, and some of the points resolved have been ever since wholly disregarded by the English courts, yet it is deemed of too much importance to be wholly overlooked.

Sir John brought trespass against three, F., T., and J. F. appeared, and the plaintiff declared against him with *simul cum*, and he pleaded *non cul.*, so did T. The issues were tried severally; that between the plaintiff and F. first, and damages assessed to two hundred pounds. The damages against T. were assessed at fifty pounds. J. appeared and confessed the action, and a writ of inquiry was awarded, but none issued. Judgment was had for the plaintiff, which was affirmed in error, the court adopting the following resolutions:

1. *Resolved*, in trespass against divers who plead *non cul.* or several pleas, which are found in all for the plaintiff, damages shall not be assessed severally, although one did more wrong than another, because the trespass was entire, and the act of one is the act of all; but if they be found *guilty at *several times*, [39] they may, and if the *plaintiff confess* the trespass to be at *several times*, the writ shall abate.

2. If two trespassers plead severally, both shall be bound with

the damages assessed by the first jury, and the other shall have an attaint, though he be a stranger to the issue, because he is a privy to the charge. If one of them after appearance make default, a writ of inquiry shall be awarded to save a discontinuance, but none shall issue, because he shall be contributory to the damages taxed by the jury who tried the other issue, and the other shall not be charged with damages assessed upon a writ whereupon he can have no attaint; but if the other issue be found against the plaintiff, then it shall issue.

3. Although there was a discontinuance against J., because in the common pleas, where the action was brought, there is no continuance after a writ of inquiry (otherwise if it is in the King's bench), yet it is aided by the statute. 32 H. 8, c. 30.

4. Forasmuch as in judgment of law the several juries here gave *one verdict at one time*, the plaintiff may have his election to have judgment *de melioribus damnis* by any of the inquests, and the same shall bind all, but there shall be but one *unico executio*. In this case the greater damages were first taxed.

5. In trespass against divers, who plead several pleas triable by the same jury, and the jury sever the damages, all are vicious.

I will now proceed to examine the authorities which bear *directly* upon the rights of the defendant, to plead a former recovery against a co-trespasser, in abatement, or bar of a suit against himself, and think they will be found abundant to sustain the plea in this case.

If a person injured by a trespass has brought an action against *one* of the parties to the trespass, he can not bring a second suit against any other of them; for, although the defendant in the second action be a stranger to the record in the first, he may, *being a party to the trespass*, plead the *pendency* of the first action, in abatement of the second suit; or he may plead the acquittal or judgment in the first, in bar of the second. 5. Bac. 185, Trespass G. 40] *But it can not be pleaded until the plaintiff has declared in both that it may be determined if it be the same cause of action. 5 Bac. 201, Trespass J.

A former recovery in assault, etc., is a good plea, notwithstanding subsequent damages, for the consequence of the battery is not the ground of the action but the measure of damages. Bul. N. P. 19, cites *Totter v. Beal*, Salk. 11. If a battery be committed by several, and a recovery he had against one, such recovery may

Wright v. Lathrop.

be pleaded in bar to an action for the same battery against another. Bul. N. P. 20, cites Yelv. 68.

If the person injured by a trespass sues one and *obtains judgment*, the others concerned may plead it in bar. Yelv. 68; Esp. Dig. 318, Selw. N. P. 46, 47.

Judge Swift, in his late excellent digest, says, different actions can not be brought against different trespassers for the same trespass; and if brought, the second suit may be pleaded in bar of the first. 1 Swift's Digest, 532, 657. And the plaintiff can not sever and bring suit against one for part, and against another for other part of the same trespass. 1 Swift's Digest, 533; *vide* also 15 Johns. 432.

In Boyle v. Bayliff, 1 Camp. 69, Lord Ellenborough determined that the pendency of another suit for substantially the same trespass may be pleaded in abatement.

Where a matter has been tried upon a particular issue in trespass, and found by the jury, such finding may be replied as an estoppel. 1 Chitty Pl. 575; 4 Mass. 443; 3 East, 346; 2 Selw. N. P. 1243.

Morton's case in Croke Eliz. 30, was trespass. The defendant pleaded that it was done by him and one J. S. and that the plaintiff brought trespass against J. S. and recovered and had execution, and is satisfied. Wray, Ch. J., and Clench, Judge, were for supporting the bar. Goudy, J., contra; for the trespass is always several, and recovery against one, and satisfaction for the damages he has done him, is nothing to the trespass by the other; but a *release to one is available to the other*, for, by the release, *he acknowledges himself satisfied!*

Goudy, however, seemed to yield, yet the cause was *adjourned*. He cites Hobart, 66, D; Lit., sec. 376. It will be seen, by adverting to Esp. Dig. 415, and other compilers, that the opinion of the two judges has been received *by the profession as a decision of [41] the sufficiency of the plea in bar upon the verdict and judgment, and the plaintiff's election to bring his action single. The circumstances of execution and satisfaction were considered immaterial, except in the confused mind of Judge Goudy.

Brown v. Wooten, Oro. Jac. 83, was trover for plate. The defendant pleaded that at another time the plaintiff had brought his suit against J. S. for the same plate, and recovered. It was objected that the plea was not good *without averring satisfaction; but*

Wright v. Lathrop.

all the court held the plea to be good; for the action being against divers for which damages *uncertain* are recoverable, and *judgment* had against one for damages *certain*, that which was uncertain is reduced *in rem judicatem*, and to certainty, which takes away the action against the others. Popham, J., said, if one hath judgment to recover in trespass against one, and damages are certain, though he *be not satisfied*, he *shall not* have a new action. By the same reason, if one hath cause of action against *two*, and obtain a *judgment* against *one*, he shall not have *remedy* against the *other*, and the allegation that he hath *the one execution* for the cause is *not an answer to the purpose*. The difference between this case and the case of debt upon an obligation against two, is because every of them is chargeable and liable for the whole debt, and therefore a recovery against one is no bar against the other until satisfaction.

This subject came under the consideration of the Supreme Court of Massachusetts, in *Baker v. Lovet*, 6 Mass. 68; and the decision there is not at war with the principles I contend for, although *satisfaction* was an ingredient of the plea in that case.

The case was trespass by the plaintiff, an infant. The defendant pleaded in bar that it was committed jointly by him and one Dennies, and that, pending the suit, plaintiff had accorded with Dennies, who had paid him fifty pounds in full satisfaction. Plaintiff relied on his infancy. Judge Parsons says, it is confessed by the pleadings that the trespass was committed jointly with Dennies, and that Dennies has made full satisfaction. The plea in bar is sufficient, unless the plaintiff can avoid it for infancy, which the judge thought did avoid it.

42] *It is certainly a singular feature in this case, as reported, that the plaintiff, *though an infant*, should be permitted to *retain* the satisfaction received, and relying upon his infancy, be permitted to recover a new satisfaction. Infants are, by law, *protected* in their rights, but not *aided* to do wrong to others. It does not appear that a *release* was given and pleaded, which, it is admitted, would have been void; and suppose the act voidable, which I do not dispute, it is conceived the election to make void should be accompanied by a restoration of that which he received as a consideration for the act he would avoid. But I consider the whole class of cases, and the doctrine of satisfaction by one inuring to the benefit of the whole, as turning upon the point, that the trespass is a *unit* which one discharge satisfies. It sounds in dam-

Wright v. Lathrop.

ages not ascertained or made certain, and when reduced to certainty, *in rem judicatem*, as in judgment, the uncertain *cause of action* no longer exists, but is merged.

The highly respectable and erudite Court of Appeals in Virginia have, on a full examination of all the authorities and adjudications, maturely considered and decided the point in two cases before that court.

The first, the case of *Ammonet v. Harris and Turpin*, 1 Hen. & Munf. 488. The plaintiff brought trespass against twelve. His writ was served on four only, who appeared, and the plaintiff had a verdict and a judgment against them. Afterward two of the others were served, who appeared and pleaded the former judgment in bar. The plaintiff demurred, and judgment was given for defendants. See also Selw. N. P. 46, 47.

The second is the case of *Wilkes v. Jackson*, 2 Hen. & Munf. 355. This was trespass against T. U., who pleaded *puis darrien continuance*, that the plaintiff had, in another action, recovered in trespass one hundred and twenty dollars damages against B. U. for the same trespass. The material question raised in the court of appeals was, whether, in an action of trespass against one, he can plead in bar a judgment against another for the same cause of action in another suit. The court said that in a former case, 1 Hen. & Munf. 488, every judge expressed an affirmative opinion on the point in question, namely, that a judgment recovered in an action against one 43] trespasser, may be pleaded in bar to an action *brought against another for the same trespass, and judgment was given for the defendant.

Opposed to this doctrine is the case of *Livingston v. Bishop*, 1 Johns. 289, in New York, and the cases in the same court, founded on that decision.

In that case, five several suits had been brought for a joint trespass. Pending the suits, and before the trial of either, it was agreed that Bishop should be answerable for the whole damages, if, on trial, verdict should be had against him; and if the court should be of opinion the plaintiff was entitled to costs on the other suits, after the trial and recovery against Bishop, then the other defendants were to pay costs, otherwise not. Judgment was had against Bishop, execution taken, and satisfaction. Then the question as to costs, for the other four, was submitted without argument. Kent, J., observes, it is uncontroverted that for a joint trespass the

Wright v. Lathrop.

plaintiff may sue *all* together, or each separately, and each is answerable for all. It would *seem* to result that a trial and *recovery* against *one*, is no *bar* to a *recovery* against *another*. If but *one* recover, it is in vain to say the plaintiff may bring separate suits, for the case *first* tried may be used *puis darrien* continuance to *defeat the other*. The more rational rule appears to be, that you may have separate recoveries, and but *one* satisfaction, and that the plaintiff may elect, *de melioribus damnis*, and issue execution accordingly; and when *he has made his election*, he is concluded by it, and the other defendant would be relieved *on the payment of costs*. This is agreeable to Sir John Heydon's case, which was against several, and one appeared and pleaded, and afterward another appeared. They were separate venire, trials, and damages. The court gave the plaintiff *election of best damages* to bind all, and but *one* execution. *Brown v. Wooten*, Cro. Jac. 73, is opposed to this. There the court took a distinction between a recovery of a thing certain, and a thing uncertain. In a joint contract on a bond, they held a recovery and execution no bar, without satisfaction; but where it rests only in damages, a recovery and judgment against one was a bar; for the uncertain demand was made certain, and the plaintiff should not resort to his uncertain demand again. There was in that case an execution, and, so far as the court go beyond, their opinion is *extrajudicial*.

44] *The principle of things certain and uncertain, *applied equally to both cases*; yet afterward, in *Claxton v. Swift*, 3 Mod. 86; 2 Show. 484, in assumpsit, the court held a *recovery* without *satisfaction*, was no bar. *Brown v. Wooten* was clearly introductory of a *new rule*. It is laid down in Brooke, Judgment, pl. 98, you may have several actions, damages, and executions, and *one can not plead recovery and defendant in execution in bar*. In Morton's case it was doubted if judgment and satisfaction was a bar, but it was allowed by the court. Many cases since *Brown v. Wooten* *seem* to disregard it, and make *satisfaction* the test. In *Cook v. Jennes*, Hob. 66, held, that plaintiff may choose the best damages, but can have but one satisfaction. In *Corbet v. Barns*, Wm. Jones, 377, held, that for one assault plaintiff can have several suits and recover, but when he has had one recovery *and satisfaction*, he can not have a second satisfaction.

In *Bird v. Randall*, 3 Burr. 1345, Lord Mansfield said the plaintiff could proceed against one or all of several joint trespassers as he

Wright v. Lathrop.

pleased, but should have but one satisfaction. I am, therefore, *inclined* to question the extent of *Brown v. Wooten*, and to hold that a recovery against one joint trespasser is not alone a bar to a suit against another. There must at least be an execution to bring the case within the facts on which that decision was had, and that, perhaps, may be considered an election *de melioribus damnis*, and sufficient to conclude him. The trial and recovery in the present case was, therefore, no bar to the other suits, and the plaintiff is entitled, *under the agreement, to costs*. The fact that execution has issued, and satisfaction been received on the judgment against Bishop, is not material, as the present question arises upon the agreement.

I have said I trusted I should be able to show that this case, *Livingston v. Bishop*, was predicated upon a misapprehension of the law. The other decisions in New York are founded on this, apparently without further examination of the law, and if I am able to shake the *authority* of this, the others must fall of course. I have not quoted Judge Kent's opinion at length, but sufficiently so to lead to a correct understanding of the case, and to avoid doing him injustice in the examination I shall give it. I am aware it may be considered vain, if not visionary, to call in question the opinion of Judge Kent. Justly esteemed by the profession, [45 almost universally, as occupying the first rank among the able jurists of our country, if not of the age in which we live, his opinions and decisions are generally received as law, without examination, and the severest scrutiny rarely fails to remove all doubts and to insure conviction in his accuracy; yet, discouraging as the prospect is, where the odds are so fearful, I am encouraged forward by my own conviction of his error, and his declaration of *surprise* "to meet with so much contradiction and uncertainty upon the subject."

The judge starts with an uncontroverted proposition, that for a joint trespass you may sue all *together*, or each *separately*, and that *each* is answerable for *all*. He deduces the result, that a trial and recovery against one, is *no bar* to a recovery against another; and assigns as a reason, that it would be *vain* to allow *separate* suits, for the cause *first tried* might be used to *defeat the other*. You may sue all or each, and each is answerable for all, is the proposition. The result which *seemed* to the judge to flow from this, is surely not inevitable. The right to sue one or all, and to make each liable for all, does not necessarily include the right to take

Wright v. Lathrop.

judgment and execution against each. The rule only embraces the right to *sue*, and does not touch the *legal effect of any subsequent act* of the plaintiff or the court. A discharge by the plaintiff, *after suit*, would be a good *bar*, and yet would not affect the right to sue, nor the extent of liability when the suit was brought. So with all other acts after suit brought. The judge advances but one solitary reason himself, which is, that it would be vain to allow the right so to sue, because the subsequent act might be used to defeat the suit. Would not the same rule hold good after *judgment and execution, and satisfaction*? And also in cases of accord and satisfaction, or release. Each are *after acts*, and in no way affect the right to sue, although they may *bar the right to recover*. One brings an action of slander, and proceeds to trial and verdict, which has ascertained his right to sue, yet, if he die before judgment, however clear his right to sue, the right to recover judgment is gone, even for the costs; and that, too, without any act of his, 46] and notwithstanding it is an uncontroverted maxim, that *the act of God injures no man. Might we not with equal propriety with the judge, say, in these cases, it is vain to give the right to sue, when the subsequent acts may be used to *defeat a recovery*. His rule as to the election of the best damages is equally unfortunate, though he thinks it the more rational. It strikes at the very foundation of the doctrine as to election. It is a right in the plaintiff to take judgment for the best damages, and not to take execution. No adjudged case, or even *dictum*, is found where the right to elect execution for the best judgment has been claimed or allowed. It is never spoken of, except as a right to elect the best damages for judgment, while the case is in paper. That rule, he says, is agreeable to Sir John Heydon's case. The judge is there under a mistake; in that case there were several *verdicts*, but no judgment, and questions arose if there had not been a discontinuance as to all but the first, and whether the plaintiff had a right to *elect to take judgment* against the whole for the best damages; and resolved that he had a right so to elect to take one judgment, and have one execution. The resolution would have meant precisely the same if *silent* as to the execution, for there could be no execution where there was no judgment. But if the resolutions had been that the plaintiff could have *several judgments*, and but *one* execution, it would have accorded with the judge's view of it. The election must be of record, and be allowed

Wright v. Lathrop.

by the court, as it is shown in numerous cases I have cited, and is made subject to the payment of costs as to all the other defendants, than the one against whom the best damages are assessed, for which he takes judgment. Those cases incontestably prove that, if he take several judgments, it would be error. Some confusion has arisen from using the terms judgment and recovery in speaking of interlocutory judgments on defaults and verdicts. What reason exists for carrying the rights to elect forward of the judgment to the execution? None is perceived. The issuing execution is the sole act of the plaintiff; it adjudges and determines no rights, but is a means of enforcing obedience to the adjudication of the right; it forms no part of the record. A former *recovery* (judgment) is often pleaded in bar; but was a former execution, without satisfaction, *ever pleaded in any case? The judge [47 next proceeded to examine the case of *Brown v. Wooten*, Cro. Jac. 73, which he acknowledges is opposed to his own view, and which, he thinks, introductory of a *new rule*. He says the court took a distinction between a recovery of a thing *certain*, and one *uncertain*, etc. The court took no such distinction, as appears in the report, but all were of the opinion the *judgment was a bar* without satisfaction, because uncertain damages were reduced, *in rem. judicatem*, to certainty. Judge Popham said, *arguendo*, the difference between trespass and debt, on obligation against two, is that in debt each is liable to the whole debt, and, therefore, a recovery against one is no bar for the other, without satisfaction. This is not attributable to the court, and is admitted to be a careless expression of the judge, if reported correctly; but a moment's reflection upon the nature of actions arising *ex contractu* will put the matter right. On joint contracts you can not recover separate judgments. If non-joinder of all the parties appear on the record, it is bad on demurrer, or on error; if not, the party may avail himself of the objection by plea in abatement, and it will not be disputed; but if a recovery were had against one, and then suit brought against the other, the former judgment would be a bar, although there is a dictum to be found, that a recovery against one of several joint contractors will not bar a subsequent recovery against all in one suit. That does not touch my position, and I will not delay to examine *why* that may be so. If the contract be joint and several, the right depends upon the contract of the parties.

Wright v. Lathrop.

The law *never implies* a joint and several contract; it always results from *express stipulations* of the parties. Three men in partnership buy goods on credit; they are *jointly* liable, but not *severally*; if they give a *partnership* note the case is the same. If, however, three agree in writing jointly and severally to pay money, or do anything else, the other party to the contract has the option to make it joint or several as he pleases; and if he determines to make it a *several* contract, and so sues, he recovers against each upon the *several contract* of each to pay, etc., and judgment is had against him upon that contract, because *he has so contracted*; not because of any legal liability aside from the contract. *That contract is to pay the money, and nothing *short* of the payment discharges it; his liability, when severed, is no way, in law, connected with the contract of the others than each is as collateral security for the other; and even in that case, if the plaintiff pursues his judgment after his debt is paid by another, or the security, you resort to a species of *equitable jurisdiction* to prevent his getting his pay twice. The analogy between such a case and trespass fails altogether. The liability of trespassers is not ascertained or made certain but by the finding of the jury and judgment of the court. The proceedings in the case are *stricti juris*. In the case of the joint and several contract, the liability is made certain by the parties themselves, and you resort to the court merely to *enforce* a performance. I can scarcely conceive a case to exist where there can be a several liability for the same debt, not arising from the contract of those liable. I have found but one, and in that, the court, including Lord Mansfield, determined the former recovery of a judgment against one, and satisfaction, was a bar. It is the case cited by Judge Kent, of *Bird v. Randell*, 3 Burr. 1345. A servant who had bound himself apprentice, under a penalty for his service, was *enticed* away from his employ. The master sued and recovered a judgment for *the penalty* of the apprentice. He afterward brought a suit against the person who enticed him away, and, pending the second suit, received the first judgment; on trial of the second suit, judgment was rendered for the defendant, and Lord Mansfield said, *arguendo*, he should *doubt* if the judgment would be a bar without the receipt of the amount, but he would not determine that. He said in the same way that Judge Kent quotes, that plaintiff could proceed against one or all, but shall have only one satisfaction. In a

Wright v. Lathrop.

report of the same case in Blackstone, 388, Lord Mansfield is made to say, the circumstance of the payment afterward made no difference in the case.

Judge Kent considers a recovery in separate suits, against the drawer and indorser of a note or bill, analogous to the case of joint and several trespassers; yet, in the case put, the liability of the drawer and indorser was never joint nor dependent upon the same contract, either in substance *or the time of making it. The [49 liability of joint trespassers arises from the legal fiction, that the act of one is the act of all, not on *several* acts by each.

If I am correct in the distinction as to bills, the decision of the court in *Claxton v. Swift*, 3 Mod. 86, and 2 Show. 484, does not in the least shake the principles of *Brown v. Wooten*, as Judge Kent supposes. The judge quotes Brooke, Judgment, pl. 98, as impugning *Brown v. Wooten*, and makes him say, "that one can not plead that plaintiff has recovered against another for the same trespass, and *taken him in execution*," etc.

The taking and detaining the body of a defendant in execution is held to be the highest species of *satisfaction* for a judgment; and, strange as it may seem, the *doubt* expressed by Goudy in Morton's case, Cro. Eliz. 30, and the decision in *Cocke v. Jenner*, Hob. 66, and in *Corbet v. Barns*, Wm. Jones, 377, that you can have but *one* satisfaction, and so far *directly contrary* to Brooke, are immediately afterward quoted and arrayed against *Brown v. Wooten*; and stranger still, the whole of these cases, though relied upon as authority to overturn *Brown v. Wooten*, are adverse to the opinion and decision of the judge by whom they are cited, in the very case in which he cites them. *He* holds that judgment and execution issued without satisfaction would be a bar; as if, doubting and confused himself, he feared he had not got rid of the decision in *Brown v. Wooten*. Judge Kent says further, in that case there appeared to have been an *execution* in the first case, and so far, therefore, as the opinion of the court goes to declare that a judgment alone constitutes a bar, the opinion was *extrajudicial*. After this declaration it will scarce be credited that his main reliance had been upon the *extrajudicial doubt* of Judge Goudy, and the *extrajudicial doubt* of Lord Mansfield, accompanied by a protest that he would not determine the point; that the *point* as to *trespassers* could not have arisen in the case before Lord Mansfield, and that the very opinion of Judge Kent himself was *extrajudicial*:

Wright v. Lathrop.

The case he decided presented only the question as to the right of costs in the second suit; nothing as to the damages, or the *election de melioribus damnis*. In his case, also, there was an execution and 50] satisfaction, and the point presented to him as to costs *did not arise in any regular course of pleading or proceedings, but upon an *extrajudicial* agreement, entered into by the parties, that as to costs they would abide by the opinion of the court. No judgment was asked or rendered. Pressed by this circumstance, or something else, Judge Kent says, at the conclusion of his opinion, that the fact that *execution* had been issued, and *satisfaction* received of the judgment against Bishop, is *not material*, as the present question arises *upon the agreement*. The opinion he pronounced was that the plaintiff was entitled to costs up to the time of the agreement. The execution and satisfaction here were not *material*, yet he had labored through the whole opinion to show that the issuing and execution alone was *more material than the judgment itself* in determining the rights of the parties. The fact is, the judge has gone too far, and involved himself in difficulties. If his opinion on the case is to be relied upon, *judgment, execution, and satisfaction*, all combined, would be no bar!

No reason is perceived in favor of the doctrine claimed by the plaintiff and supported by Kent. The right to bring *several* suits in trespass is not analogous to the same right in any other case, and is particularly onerous. Why not resort to all you intend to seek recompense of at once? The danger arising from want of certainty as to all engaged under the statute allowing part to be found not guilty, does not jeopardize the plaintiff's right. The law does not favor a multitude of litigation and actions for one subject. In general, where several suits are brought *unnecessarily*, courts will order a *consolidation*. Our legislature have provided for it. [22 Ohio Laws, 67.] Similar laws exist in other states, and in the congressional enactments. The rule in trespass is anomalous, and should not be extended. The proceedings in such suits are *stricti juris*. On the other hand, many reasons exist for making the first judgment conclusive; besides those already given, I will trouble the court with but one. In trespass *de bonis asportatis* (the case at bar), the recovery of judgment changes the *ownership* of the *property*, if it has not been returned. The property in the chattel is changed and vested in the defendant when 51] judgment is recovered, and if sold by judicial *process, the

Wright v. Lathrop.

defendant is entitled to the money. 11 Johns. 382. Fenner, Judge, in *Brown v. Wooten*, Cro. Jac. 73, says that in case of trespass, after judgment given, the property of the goods is changed, so as the plaintiff may not seize them again. No contribution can be enforced among trespassers. It would, then, be manifestly unjust to give a defendant, against whom judgment was first had, all the advantage resulting from a change of property, and still hold the co-trespassers liable to all the damages assessed against the one first sued, or even more if more should be assessed by a jury, and perhaps exonerate the defendant, who had acquired the right of property, the damages recovered against whom formed the legal consideration of the transfer. The case at bar is a strong one to show the injustice of such a doctrine. The defendant here is sought to be made a trespasser, not for any act done by him, but by relation, he being the attorney marked on the writ on which the goods were taken in execution by the sheriff, the former defendant, which is the trespass complained of. A recovery for, say twelve hundred dollars, was had against the sheriff, but no execution issued, and the present suit was brought, the sheriff used as a witness, and judgment had in the common pleas against the present defendant for twenty-five hundred dollars on his evidence! The whole property taken was, by the first judgment, transferred to the sheriff. By his procurement better damages (more than double) are assessed against a solvent defendant, on which judgment is claimed.

The authorities in *Bacon*, *Buller*, *Salkeld*, *Yelverton*, and the cases of *Crane & Hill v. Hummertone*, *Mitchell v. Millbank*, *Ammonet v. Harris & Turpin*, *Sabin v. Long*, and *Boyl v. Bayliff*, seem not to have met Judge Kent's notice in deciding his case. The publication of *Swift's Digest* and the case of *Wilkes v. Jackson* have occurred since, and must have been made with a full knowledge of his decision. The authority and respectability of the Virginia Court of Appeals are equal to that of any other court in the Union.

From the foregoing cases, and the principles applicable to the action of trespass, I think we may fairly deduce the following rules as the true one pertaining to the action, and as going far to reconcile the conflicting decisions and dicta with themselves and with reason :

Wright v. Lathrop.

52] *1. That the person injured by several joint trespassers may elect to bring suit against all or any part of them.

2. When several are sued in one suit, and join in their defense, the verdict and judgment *must* be entire as to all found guilty.

3. Where several are sued in one suit who sever in their defense, the jury *may* assess either *joint* or *several* damages; but if several damages be assessed, the plaintiff may enter a *cessat executio* until a trial is had against the others, and then, on entering a *nolle* as to all the rest, elect and take judgment against the one as to whom the best damages are found.

4. Where several suits are brought, the plaintiff has the same election on the same conditions.

5. But in no case can the plaintiff take two judgments for the same trespass, and if he seek to do so, the first judgment may be pleaded in bar of a second recovery.

Opinion of the court, by Judge SHERMAN:

The only point presented by the pleadings is whether a judgment recovered by the plaintiff, against one joint trespasser, is a bar to an action brought against another for the same trespass. I am aware that the authorities on this subject are by no means clear or reconcilable. An examination of the English reports will show that though there is no modern case where the precise question made by this plea has been adjudicated upon, yet the principles upon which it rests have been often discussed. In *Bird v. Randell*, 3 Burr, 1355, Lord Mansfield observed that in case of joint trespass the defendants were all liable to the plaintiff, and he might proceed against one or all of them, as he pleased, yet he shall have but one satisfaction from all. In *Drake v. Mitchell et al.*, 3 East, 251, Lord Ellenborough says: "I have always understood the principle of *transit in rem judicatem* to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy, from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore, till 53] *then it can not operate to change any other collateral concurrent remedy, which the party may have."

That each joint trespasser is answerable for the acts of all, and that the plaintiff may pursue his remedy against one or all, is un-

Wright v. Lathrop.

questioned. He is entitled to a compensation in damages for the injury he sustained by the commission of the trespass. This compensation he may recover from one or all of the joint trespassers. His remedy against them severally is concurrent, and they are *quasi* collateral security for each other until the plaintiff has obtained satisfaction. It would seem to follow, from this doctrine, that a recovery of a judgment against one joint trespasser would be no bar to a suit and recovery against another.

If a judgment, against one of several joint trespassers, is of itself a bar to all legal proceedings against the others, it will, in a great degree, deprive the plaintiff of his right of bringing several suits, and of his election *de melioribus damnis*, as each defendant, except in the suit first tried, may plead *puis darrien* continuance, the recovery in that suit as a bar to the plaintiff's further proceeding, thereby limiting the plaintiff to the recovery of a single verdict, and subjecting him to the payment of costs in all the suits but the one first tried.

If a joint action be brought against all the trespassers they may sever in their pleas, and the several issues made may be tried by different juries, and separate and different damages assessed; and the plaintiff has his election of the damages so assessed, which shall bind all the defendants. Haydon's case, 11 Co. 5.

The case of *Brown v. Wooten*, Yelv. 67; Cro. Jac. 73, is the only one I have been able to find in the English reports, where a plea of a former recovery against a third person for the same injury, without an averment of satisfaction, was held good. That was an action of trover for goods; the defendant pleaded a judgment and execution, in favor of the plaintiff, against one J. S. for the same goods, and the plea was sustained. In *Livingston v. Bishop et al.*, 1 Johns. 290, Chief Justice Kent, speaking of the case of *Brown v. Wooten*, says it is clearly introductory of a new rule, and *cites [54 Brooke, Judgment, pl. 98; Morton's case, Cro. Eliz. 30, and that many cases subsequent to that seem to disregard it, and make the satisfaction against one trespasser the test of the plea. In *Brown v. Wooten*, the plaintiff had sued out his execution on the judgment against J. S., and if that is to be considered an election by the plaintiff *de melioribus damnis*, it will conclude him from pursuing the other joint trespassers. But, in the case at bar, the plaintiff has not issued an execution on the judgment recovered by him, or done any other act from which it would be inferred he had elected

 Lessee of Johnston v. Haines.

the damages recovered by the verdict and judgment mentioned in the plea.

The Court of Appeals, in Virginia, has decided that a verdict and judgment against one of several joint trespassers was a bar to a recovery against the others. 1 Hen. & Munf. 488; 2 Hen. & Munf. 355.

The Supreme Court of New York, in *Livingston v. Bishop et al.*, 1 Johns. 290, determined that a recovery against one joint trespasser is not a bar to a suit against another, and this decision has been adhered to by the same court in a number of subsequent cases.

When the authorities present so much uncertainty and contradiction on the subject, the court feel themselves at liberty to adopt that rule which to them appears most consonant with reason and justice. And the rule which appears the more rational to the court, and in accordance with the general principles of law applicable to the action of trespass, is, that the plaintiff may elect to bring separate actions for a joint trespass, and may have separate verdicts and judgments, but that he can have but one satisfaction. This will preserve to the plaintiff the right, which all the authorities admit he has, to bring a joint suit against all or a several suit against each joint trespasser; and, also, secure to him his election *de melioribus damnis*.

The opinion of the court, accordingly, is that the plea in bar is insufficient, and the demurrer thereto sustained.†

55]

*LESSEE OF JOHNSTON V. HAINES.

Where the person taking acknowledgment of a deed gives himself no official character in his certificate or subscription, the acknowledgment is insufficient, and the record of the deed irregular. Copy of it duly certified can not be given in evidence.

Proof to supply defective certificate of acknowledgment of a deed can only be given when original deed is produced.

At the trial of this cause, the plaintiff, in deducing title, offered

†NOTE BY THE EDITOR.—As to joint trespassers, see also v. 250. As to contribution by, see xviii. 1, and cases; ii. 89.

Lessee of Johnston v. Haines.

in evidence the copy of one deed in the chain of title, duly certified by the recorder, together with the copy of the certificate of acknowledgment as made by the person taking it. In this acknowledgment it was not expressed that the person taking it was an officer of any kind, and the name subscribed was without any official character. The plaintiff offered to prove, by other evidence, that the person who took the acknowledgment was, in fact, at the time a justice of the peace duly commissioned and qualified. The defendant objected to the copy of the deed, and to the evidence of the character of the person who took the acknowledgment. The deed and evidence were both rejected, and the plaintiff was nonsuit. A motion was made for a new trial, on the ground of error in rejecting the deed and evidence, and the decision of the motion adjourned to this court.

LEONARD, for the plaintiff.

ATKINSON, for defendant.

By the COURT:

When a copy of a deed, signed by the recorder, is offered in evidence instead of the original, its admissibility depends upon the fact whether the original has regularly been admitted to record; for the mere fact of recording a deed, without the legal requisites, gives it no validity.

The statute, providing for the execution and acknowledgment of deeds, which was in force when this deed was recorded, required that the execution of all deeds for the conveyance of lands should be acknowledged by the grantor, or proved by the subscribing witnesses, before some judge or justice of the peace, and recorded in the proper county. The acknowledgment or proof is nothing unless it be taken by an authorized officer, and whether the person be authorized or not, is a fact which ought to appear in the certificate *of the officer himself. This, *prima facie*, would [56 be sufficient to authorize the record and to throw the proof on the person impeaching the deed. In this case nothing of the kind appears in the certificate or attached to the subscription, consequently the deed was not duly recorded and the copy can not be received as evidence.

Proof, distinct from the certificate upon which the record was

Clark v. Boyd.

made that the person who made the acknowledgment was, in fact, a justice duly qualified, could not be received at the trial, because it was a copy, and not the original, to which the evidence was intended to be applied. We do not decide what would be the law had the original deed been in court, and proof offered that the person who took the acknowledgment was a justice. We think it clear, that in the case of a copy such proof can not be received. The record being irregular the original is not proved, and until that is done a copy can not be used. The court decided correctly in rejecting the testimony, and the motion for a new trial must be overruled.†

JOHN CLARK v. JOHN BOYD.

Where there is other proof that a subscribing witness to a writing resides in a different jurisdiction, it is not necessary to take out a subpoena and have a return not found.

Proof of the handwriting of the subscribing witness to a writing where the witness is out of the jurisdiction, is proof of its execution by the party.

An assignment indorsed upon a note, and the note retained by the assignor until his death, vests no interest in the assignee.

THIS action was brought by the plaintiff, as assignee of Philip Pierce, and was founded upon two promissory notes, one for thirty-eight dollars, the other for two hundred and eighty dollars, both given by the defendant to Philip Pierce. The defendant pleaded *non est factum*, without affidavit, and gave notice of payment.

At the trial before the Supreme Court in Highland county, to prove the execution of the assignment indorsed upon the note, the plaintiff introduced a witness to prove the handwriting of the subscribing witness to the assignment, accompanied with proof that he resided in Pennsylvania. No subpoena had been taken out for the witness, and the defendant's counsel objected to the evidence. The objection was overruled, and the proof admitted. The handwriting of the attesting witness to the assignment being

†NOTE BY THE EDITOR.—The law of this case is recognized in the case of *Lessee of Livingston v. McDonald*, ix. 168.

Clark v. Boyd.

*proven, the plaintiff offered to give the notes in evidence to [57 the jury, but the defendant objected, and insisted that the handwriting of the assignor must also be proven. The court overruled the objection, and the notes were read in evidence to the jury, and the plaintiff rested his case.

The defendant then gave evidence to the jury, that Pierce, the assignor of the note, had been some time deceased, and that, at the time of his death, the note for two hundred and eighty dollars was found among his papers, indorsed by him to the plaintiff. That the executors, supposing it to be the property of Clark, had not inventoried it as part of the assets of Pierce, but had delivered it to the plaintiff. Upon this evidence the defendant's counsel moved the court to instruct the jury that the plaintiff ought not to recover, unless, in addition to the fact of executing the assignment, they were satisfied the note so assigned had been delivered to the assignee, or some person for his use. This instruction the court gave, but the jury found a verdict against the defendant for the whole amount.

The defendant moved for a new trial upon the grounds:

1. That the court erred in permitting proof to be given of the handwriting of the subscribing witness to the assignment, without a subpoena having been issued for such witness, and returned not found.
2. That the court erred in permitting the notes to go in evidence to the jury, without proof of the handwriting of the assignor.
3. That no proof being given that the notes, after the assignment, were delivered to the plaintiff by the assignor, the verdict was against the charge of the court on that point, and against evidence.

The consideration and decision of this motion was adjourned to this court.

BOND, in support of the motion:

It is not known that any particular practice has been established, in this state, as to what steps the party must take to entitle him to give evidence of the handwriting of a subscribing witness. The best and safest would seem to be a requisition that a subpoena should be put in the hands of *the sheriff, a reasonable time before [58 the court. When that is returned that the witness can not be found, it furnishes a ground for belief that the witness is not within reach of the process of the court.

Clark v. Boyd.

It has been decided that a note may be given in evidence upon proof of the handwriting of the subscribing witness, without proof of the handwriting of the maker. These decisions in other countries ought not to conclude this court, and we claim that upon principle it is much safer to rely upon proof of the handwriting of the maker. It is the next best proof. The subscribing witness is the best proof, because we expect from him some account of the transaction, and the omission to produce him, if unaccounted for, involves a suspicion, that, if produced, his testimony would be unfavorable.

It is a serious objection to the rule declaring the proof of the handwriting of the subscribing witness sufficient, that it puts the party in a better situation, to practice fraud, to have the witness absent. If the witness were present, and could say no more than that he recognized the handwriting, the case would not stand as strong as upon proof, in his absence, of the handwriting; for that proof involves the inference, that, if present, he would prove the execution.

There was no proof of the delivery of the larger note after the assignment; the proof was full that it remained in the hand of the assignor until after his death. The jury have disregarded the opinion of the court as to the law, expressly given them in charge. For this reason there ought to be a new trial.

SILL and LEONARD, on the other side:

It is only one mode of proving a witness out of the jurisdiction of the court, to issue a subpoena and have the return "not found," indorsed upon it. It is sufficient in the absence of other, and more positive proof, but can not be made to exclude that proof.

The principle is well settled, that where a subscribing witness resides abroad, the proof of his handwriting is sufficient proof of the execution of the note to let it go to the jury. 1 Bos. & Pul. 59] 360; 2 East, 183, 250; Sel. N. P. 562, *note 7; 1 Johns. Cas. 230; 3 Johns. 477; 4 Johns. 461; 1 Hay. 20, 238; 2 Hay. 404; 5 Cranch, 13, in note.

There were circumstances which warranted the jury in believing that the note had been delivered after the assignment. Besides, this is a question between the executors and the plaintiff; as they have not contested it, the defendant has no right to do it. The note came to the hands of the executors indorsed—they de-

Clark v. Boyd.

livered it to the plaintiff. This was in completion of the original contract, and was a sufficient delivery. We think this decisive of the case.

By the Court:

The place where a person, who has subscribed any instrument of writing as a witness, may reside, is a matter of fact, existing in parol and consequently capable of proof in different modes. The knowledge of a witness examined in court, is, at least equal to any other mode of proof. The fact of a subpoena being sued out and put in the sheriff's hands, and returned by him "*not found*," can not be higher proof than that of a witness who testifies to his own knowledge of the residence of the person. The one can, upon no principle, be held a pre-requisite to the admission of the other. The court were correct in admitting the testimony as to the residence. The authorities cited show conclusively that where the subscribing witness resides out of the jurisdiction of the court, proof of his handwriting is *prima facie* proof of the execution of the instrument subscribed. If we examine the question, upon principle, we shall find no sufficient reason for departing from the rule as settled elsewhere.

The question is, where the subscribing witness to an instrument is dead or absent, what is the proper secondary evidence to prove the execution of the instrument? The production of the subscribing witness is the best evidence. Where this can not be obtained, the secondary evidence, which is substituted for it, ought to be the nearest and most similar to it, in its character and circumstances. The proof of the handwriting of the witness is, *quasi* bringing him into court, and the legal presumption arising *upon this proof [60 is, that the parties called him to attest the execution and delivery of the instrument. It proves as much as the subscribing witness can prove himself, in many cases. Frequently he can do no more than recognize his own handwriting, being unable to recollect anything of the transaction. In such case his testimony that the attestation is in his handwriting, and must have been made by him, is sufficient. The proof of the handwriting proves as much; its nature and effect ought therefore to be the same.

When the subscribing witness is dead or absent, the court have usually admitted proof of the handwriting of the obligor, but it does not follow that this proof must be required in addition to proof

Austin and Taylor v. Williams and others.

of the handwriting of the witness, nor is the exclusion of proof of the handwriting of the witness a necessary consequence of admitting the one, where the other can not be obtained. Under proper circumstances, both modes of proof may be admissible, and either may be sufficient.

The jury were charged, that without proof that the large note, after the assignment, was delivered by the assignor to the assignee, or some person for his use, the plaintiff was not entitled to recover. Of this there was no proof; on the contrary, it was found among the papers of the assignor after his death.

The plaintiff's counsel insist that the delivery, by the executors, was a sufficient delivery, to vest the right of property and of action in the plaintiff. But we do not think so. The assignment made by the assignor while the note remained in his possession, and where no contract of sale was proved, was a mere nullity. It was in his own power, and could at any time be legally erased. It gave no interest or title to the assignee, and when Pierce died he was the absolute owner of the note, notwithstanding the assignment. The right vested, by his death, in the executors, and could only be assigned by them. The plaintiff acquired no more right by a delivery, from the hands of the executors, than he could have acquired had they delivered him a note, payable to the testator, 61] without any indorsement. The charge of *the court on this point was correct, and the finding of the jury is against both law and evidence.

New trial upon payment of costs.†

AUSTIN AND TAYLOR v. WILLIAMS, CHASE, AND GARDENER.

Evidence that a sale of goods to C. was made upon an understanding that W. was his partner, and upon the credit of W., is admissible against W., but not available without other proof of partnership.

Where a partnership have assumed no name, one partner may bind the other by contracting in the name of himself and company.

†NOTE BY THE EDITOR.—See cases cited in the note to the case on page 13 of ii.

Austin and Taylor v. Williams and others.

Proof of usage and custom of merchants may be admitted, but the opinions of witnesses are not admissible.

THIS cause was adjourned from the Supreme Court of Hamilton county, and came before the court upon a motion for a new trial.

The plaintiffs lived in the city of New York, and the suit was brought upon a promissory note, subscribed William Chase & Co. This note was executed by William Chase only, and in everything preliminary to the trial, stood exactly upon the same grounds as the case of *Aspinwall v. Williams and others*, reported Vol. I., p. 84. The parties defendants being the same, and the foundation of the partnership the same as in that case.

At the trial of this case the defendants objected to evidence being given by the plaintiff, that the plaintiffs understood, from letters in the possession of Chase, written not by the other defendants, but by third persons, at the time they sold the goods, for which the note was given, that Williams, the defendant, was a member of the firm. But the court overruled the objection, and permitted the evidence to go to the jury.

The defendant also objected to the article of agreement, between Chase, Williams and Gardner, going to the jury, as evidence of the existence of the firm of William Chase & Co., whereon to charge the defendant, Williams, but the court overruled the objection, and the article was given in evidence to the jury.

The defendant introduced witnesses to prove, that, according to the law merchant, a partnership created, without taking a name, could only make contracts in the name of all the members of the firm, and that, according to the law merchant, the partnership, claimed to have been created in this case, having taken no name, the note subscribed William *Chase & Co. could not bind [62 Williams and Gardener.

The witnesses examined testified that they knew of no established rule or custom, but expressed their own opinions, that, in the case stated, the note should only bind Chase, who executed, as it was admitted that the goods, for which it was given, never came to the hands or use of the other defendants. The plaintiff objected that the testimony was irrelevant, and the court overruled it. The court also instructed the jury that the article of agreement constituted a partnership from the commencement, according to the

Austin and Taylor v. Williams and others.

decision in the case of *Aspinwall v. Williams and others*, before referred to.

The jury found a verdict for the plaintiffs, and the defendants moved the court for a new trial, upon the ground that the court erred in ruling all the points before stated. The decision upon this motion was adjourned here.

GAZLAY, in support of the motion :

Whether the defendant was a member of the firm of William Chase & Co. was a fact which could only be proved by the articles of agreement, or by persons who knew the fact, from being present at the formation of the partnership, or by the acknowledgments of the defendants to be charged. The fact that it was so understood by the plaintiffs, or others in New York, was not admissible evidence; because not founded upon knowledge, but upon hearsay.

The article of agreement ought not to have been admitted in evidence; it contained stipulations for a partnership between the defendants, but it recognized no such firm as that of William Chase & Co., unless it be a legal deduction, that when persons associate for a particular purpose, and take no name, any one of them, without the consent or knowledge of the others, may assume a name and bind the others by it.

This is denied to be law. It is a principle, as applicable to partnerships as to other contracts, that no person can be bound by an agreement, but with his own consent, expressed by the means and in the mode he has authorized. The law is supposed to be well settled, that a partner in *making a note to bind the firm, must sign the name of the firm, or the individual names of the members. Chitty on Bills, edition 1821, p. 52, 53; 1 Salk. 126; Doug. 653. It has even been decided, that when a note appears on the face of it to be the separate note of A., it can not be declared on as the joint note of A. and B., though given to secure a debt for which both were liable. 15 East, 7. [On this point Mr. Gazlay made an elaborate argument, contesting the correctness of the decision in *Aspinwall v. Williams and others*, as to the commencement of the partnership, which it is deemed unnecessary to report.]

The evidence of merchants, as to the usage and custom, in cases where no name is assumed in the articles of copartnership,

Austin and Taylor v. Williams and others.

and in what manner writings should be signed to bind the partnership, ought to have been received. Chitty on Bills, edition 1821, p. 49; Doug. 653. The case in Douglas was this: Two persons, not partners, drew a joint bill, payable to their order; one of them only indorsed it, and the indorsee brought an action against both. The question was, whether the indorsement of one was a sufficient transfer to vest the interest in the indorsee. At the trial, Lord Mansfield nonsuited the plaintiff, conceiving that the interest could only pass by the indorsement of both. But, upon a motion for a new trial, the court were unanimously of opinion, that the indorsement was sufficient, and a new trial was granted.

Upon the second trial the defendants offered evidence that, by the universal understanding and usage of all the bankers and merchants in London, the indorsement was bad, because not signed by both payees. The evidence was objected to, but admitted, and a verdict found for the defendants. This decision is supposed to be a full authority for admitting the evidence offered, in the case at bar.

No argument was submitted on the other side.

By the COURT:

The evidence that the plaintiffs understood the defendant to be a partner at the time the credit was given, was not offered or admitted to prove the partnership, but to prove that credit was, in fact, given to the defendant Williams. *For this purpose it [64] was clearly admissible. Whether the conduct of the defendant had been such as to authorize this understanding, was a distinct fact, to be proved by other testimony, without which the plaintiff could not recover.

In the case of *Aspinwall v. Williams and others*, 1 Ohio, 84, this court decided, upon full deliberation, that the agreement between the defendants constituted an immediate partnership; and to that opinion they still adhere. In that case, too, they adjudged that the note subscribed William Chase & Co. bound the partnership. This opinion is not shaken by the authorities and arguments now urged for the defendant. The rule laid down in Chitty, and upon which the defendant relies, is thus stated: "Whenever a person draws, accepts, or indorses a bill for himself and partner, he should always *express that he does so for himself and partner*, or subscribe both the names, or the names of

Crary v. Same Defendants.

the firm, and that otherwise it will not bind the partner." This rule is broader than the defendants' counsel admits. Although neither the individual names of the partners, nor the name of the firm is used, still the partner may be bound if the party signing *express that he does so for himself and partner*. There is no set form of words in which this expression should be made; and, where the firm have assumed no name, as in this case, the signing, William Chase & Co. is a clear and sufficient *expression*, that the note was given for the drawer and his partners, and must bind the firm.

The evidence offered by the defendant of a usage and custom of merchants was overruled, after it was given, because it did not go to establish any such usage or custom as was set up. The witnesses testified only as to their own opinions. A universal usage and understanding among merchants, as in the case cited from Douglas, is very different from the mere opinions of witnesses, and upon this distinction the testimony was properly overruled. The motion for a new trial must be overruled, and judgment entered on the verdict.†

65]

*PETER AND J. CRARY v. SAME DEFENDANTS.

The only distinction between this case and the foregoing one, was, in this no note was given, but the goods sold were charged and invoiced to William Chase & Co. The court held that this circumstance did not vary the case.

Same order and judgment.

†NOTE BY THE EDITOR.—That a partner can not bind a copartner by a bond under seal, see vii. 175, part 2; xi. 223. Power of a partner to bind his copartners generally, see i. 84; iii. 425; v. 514; xiii. 300; xiv. 58, 592. As to what constitutes, and what evidence will establish a partnership, see i. 84; xvi. 166. For a late case touching evidence to support a usage or custom, see xvi. 421.

McCormick v. Alexander.

McCORMICK v. ALEXANDER.

Under the execution law of 1824, judgment creditors, who had not sued out and levied execution within twelve months from the date of judgment, lose their lien and preference, as against subsequent judgment creditors, who had sued out and levied execution within twelve months; and this in case of judgments before the enactment of the law, as well as after it.

THIS cause was certified from the Supreme Court of Clark county. It was an action against the sheriff, and the question in controversy was who, of several parties, was entitled to a sum of money made upon execution. The facts of the case, as agreed between the parties, were as follows:

Several judgments had, at different periods of time, been rendered against the same defendant.

The first for the Urbana Bank, November term, 1820, upon which a *fi. fa.* issued May, 1821, and another in February, 1822, both of which were returned, no goods, but not levied upon land.

A second judgment, for the same plaintiff, rendered March, 1822, upon which execution issued in May, 1822, which was regularly levied upon the property, the proceeds of which are the subject of dispute, and process to enforce a sale regularly continued to July, 1823.

Another judgment, and the second in order of date, was obtained by Joseph Evans, March, 1821, upon which execution issued in November, 1822, and was levied on the same property, which was not sold, and to enforce a sale of which, proper process was regularly issued up to the time of sale.

On July 21, 1821, the plaintiff in this action obtained a judgment, and on January 10, 1822, sued out execution, and had it levied upon the same property, *which was returned, not [66 sold. In April, 1822, a *vendi.* issued, upon which the same return was made. No other process issued until January 8, 1824, when an *alias vendi.* was issued, which was returned and renewed until March term, 1825, when the property was sold under the *vendi.* on the plaintiff's judgment. The different parties all claimed the money, and this suit was brought to determine who was entitled to it. The claim of the Urbana Bank being pretty much aban-

McCormick v. Alexander.

doned, the controversy rested between Evans and McCormick. The first had the elder judgment, rendered in March, 1821, upon which no execution was sued out until November, 1822, more than twelve months after the rendition of the judgment. The latter, McCormick, had the junior judgment, but his execution was first issued and levied, and was levied within twelve months from the rendition of the judgment.

ANTHONY, for Evans:

Evans' judgment being obtained under the act regulating judgments and executions, which took effect June 1, 1820, was, when obtained, a good lien upon the real estate of the debtor, and preferable to any other judgment afterward obtained under that act; the act pointing out no time when execution should issue, but declaring generally that the lands and tenements of the debtor should be bound from the first day of the term, at which judgment shall be rendered, when the lands, etc., lie in the country where judgment is so recorded. The house and lot, in controversy, lie in the town of Springfield, in the county of Clark. This judgment, therefore, attached upon the real estate of the debtor, and vested in the plaintiff, Evans, a right which the legislature never intended to divest from him; but, on the contrary, show clearly, they meant to preserve inviolate; for by the sixteenth section of the act regulating judgments and executions, which took effect June 1, 1822, and which provides for several distinct classes of cases, it is made lawful, in all cases where judgments had been before that time rendered, and on which execution had not been taken out and levied, prior to the taking effect of that act, for the plaintiff, 67] in any such judgment, to have execution thereon, *and cause the same to be levied according to the provisions of that act, at any time within six months after the taking effect of that act. Evans having a good and existing lien under the act of 1820, availed himself of this provision in the act of 1822, by making a levy within six months after the taking effect of the act of 1822, viz: on November 23, 1822. Here, then, is a compliance with the law then in force, which preserved the lien of Evans; and had Evans purchased the property under this first execution, could any of those judgment creditors have disturbed his title? It will not be pretended. Then how is his lien affected by the act of 1824? Evans stands in the same situation as if he had purchased the

 McCormick v. Alexander.

property; executions having issued, regularly, ever since the first, and the law requiring no more, for it does not compel the creditor to purchase the property of his debtor. The legislature never intended to give the act of 1824 such a retrospective operation as to divest from creditors rights which they acquired by a strict compliance with the law in force prior to the passage of that act. It is, if not directly contrary to the constitution, at least contrary to the spirit of it, to give such construction. The provision in the act of 1824 (seventeenth section) is applicable to a different class of cases entirely; to those where judgment had been rendered under the act which required execution to issue within one year; to those cases when under the existing law the party was guilty of laches; a contrary construction would shake a large portion of the title derived from judgment and execution in Ohio, and most unreasonably too, as it was utterly impossible that judgment creditors could foresee that a little lenity toward their debtor when the law permitted it should afterward be made a ground for destroying their security altogether. It may be alleged that as the language of the seventeenth section of the act of 1824 is express, that no judgment heretofore rendered, on which execution shall not have been taken out within one year, shall be a lien, etc., that this court will feel bound to give it a strict and literal construction. But, however plausible that argument may sound, this court, I conceive, is confined by no such narrow limits, but will enter into the spirit of the law, and endeavor to arrive at the meaning of the legislature.

*COOLEY, for McCormick:

[68

It is contended, on the part of the plaintiff, that the rights of the parties are to be decided under the act of 1824, regulating judgments and executions. By the seventeenth section of that act it is expressly declared that "no judgment which heretofore has been, or hereafter may be, recovered, on which execution shall not have been taken out, and levied before the expiration of one year, next after the rendition of such judgment, shall operate as a lien on the estate of any debtor, to the prejudice of any other *bona fide* judgment creditor."

In the investigation of this case, no embarrassment can arise from either of the judgments of the Urbana Banking Company. The first judgment obtained by them, and which was older than

McCormick v. Alexander.

any of the judgments, has not been followed by a levy under either the statute of 1822, or that of 1824, and the last judgment obtained by them is subsequent to that of McCormick, which was levied within the year.

It is admitted that the judgment of Evans would, from its seniority in date, have been entitled to have been first satisfied, had Evans perfected his right by a levy within the year, and it is contended for Evans, that by his judgment, he had such a vested right that the legislature could not divest, and that it will impair the obligation of the contract to say that the lien of McCormick, under a junior judgment, is better and preferable to that of Evans'. The correctness of this reasoning is not perceived. The language of section 17 of the act of 1824 is clear and explicit; and unless the legislature had no power to enact such a provision, unless the court are prepared to say that the act is clearly repugnant to the constitution, judgment must be rendered in this case for the plaintiff. And even were the constitutionality of the law doubtful, unless in the language of Judge Chase, "the case is very clear," the court will not declare a legislative act void. 3 Dal. 395; 6 Cranch, 128; 4 Wheat. 625.

A contract is defined to be an agreement by which a party undertakes to do or not to do a particular thing. The law binds the party to perform what he has undertaken to perform, and this constitutes the obligation of the contract. But it is well settled that [69] a judgment is not a contract. *3 Burr. 1548. Admitting, in the present case, that the judgment of Evans was founded upon contract, what is the undertaking? Not surely that the party will pay the money by a given day, or that the property in question shall pay it. The distinction between the contract, and the remedy to enforce that contract, is obvious, and has been well settled. The latter the legislature have always a right to regulate as expediency may require. The remedy may be changed or modified without impairing the obligation of the contract. The act of 1824 does not impair the obligation, or the validity of the contract. The contract remains in full force, and the creditor has a right to enforce it either against the person, or the property, or the future acquisitions of his debtor. The property which the debtor might possess at the time of the contract is certainly not the principal inducement to enter into it. It is the character and integrity of

the party that forms the party's inducement to trust him. 4 Wheat. 198.

The policy of our law has been to induce the creditor to liquidate his debt by purchasing the estate of his debtor, to prevent his destruction by a ruinous accumulation of interest, and also to prevent one creditor, who might have a judgment which he did not intend, or was unwilling to enforce, from preventing other judgment creditors from obtaining their just demands. For this purpose, the act of 1820 (sec. 23), under which the judgment of Evans was obtained, provides "that when lands are sold under judgments, the purchasers shall hold the same free and clear of all judgments rendered more than one year before the judgment upon which the sale was made, upon which execution had not been taken out and levied before the time of sale," and by the act of 1822 (sec. 16), it is provided, that in all cases where the party shall have obtained judgment, and shall neglect for the space of one year next after the first day of the term in which such judgment shall have been recovered, to sue out execution thereon, and cause the same to be levied, etc., such judgment shall not operate as a lien upon the debtor's estate, to the prejudice of any other *bona fide* judgment creditor. It is urged that Evans, under the last-mentioned act, has proceeded to levy within the time prescribed, *and that his right should be as much regarded as if [70 he had actually purchased the property. The correctness of this position is denied. Had Evans purchased the property under the law then in force, no subsequent legislation certainly could have disturbed his title. But he did not purchase, and it would be saying too much to say that he shall now be considered as having done what he could or might have done. The law favors the diligent creditor, not him who sleeps upon his rights.

That lands are liable to be taken and sold upon execution at all, is matter of statute regulation. The same power that says they shall be liable to be sold for the payment of debts, may say that they shall only be *extended*, and the creditor be entitled to the rents and profits until his debt is satisfied, or that they shall not be sold for less than their full appraised value. And it might with as much propriety be urged, that a law exempting certain articles of personal property from execution, which might be passed subsequent to the contract, was a violation of the contract, as that the law in question is a violation of it.

McCormick v. Alexander.

The policy of enacting what the legislature has expressly enacted, is a different consideration, and one which will not weigh with this court. It might have been urged as reason why the law should not have been passed. It may be a reason for now recommending an alteration of it, but it can be no argument for changing the rights of the parties which have become fixed under it.

The opinion of the court, by Judge HITCHCOCK :

In the consideration of this case, I lay out of view the judgments recovered by the Bank of Columbus. The first of these was not followed by an execution sued out and levied in due time; the second was not obtained until after the judgments both of Evans and McCormick.

From the facts agreed in the case, it appears that Joseph Evans, at the March term, 1821, of the court of common pleas, for the county of Clark, recovered judgment against Jonah Baldwin, for the sum of ——. To enforce collection, on November 18, 1822, he sued out his writ of *fi. fa. et lev. fa.*, which writ, on the 23d day 71] of the *same month, was levied on a house and lot in Springfield. The property not being sold on this execution, a *venditioni* was sued out returnable to the March term of the court of common pleas, 1825. Upon this writ the property was sold to James Bishop for the sum of eight hundred dollars.

On July 21, 1821, the plaintiff, George McCormick, in the same court of common pleas, obtained a judgment against Baldwin and one McKinnen, for the sum of —— debt or damages and costs. Upon this judgment a writ of *fi. fa. et lev. fa.* was issued on January 10, 1822, and levied upon the same house and lot in Springfield. The property not being sold, a *vendi.* issued on April 10, 1822, and an *alias vendi.* on January 8, 1824.

From this statement, it will be seen that the judgment of Evans was first recovered; the *fi. fa.* of McCormick first sued out and levied, and the property eventually sold under a *vendi.* at the suit of Evans. The decision of the case depends upon the determination of the question, whether Evans or McCormick had the preferable lien.

Judgments are not of themselves liens upon property, either real or personal. How far they shall so operate depends upon legislative enactment. Hence, the laws on this subject are different in different states and countries. In some states of this Union,

lands are bound for the satisfaction of judgments from the time such judgments are rendered; in others, only from the time they have been levied upon by execution. In some states and countries they are sold under execution, in the mode prescribed by law; while in others, they are set off to the judgment creditors at their appraised value; and in others they can neither be sold nor set off, but can only be extended until the rents and profits shall satisfy the debt. In the State of Ohio, from its first settlement, judgments have operated as liens upon the lands and real estate of the judgment debtor. Lands have always been liable to be sold upon execution, under certain conditions and restrictions, prescribed by law. These conditions and restrictions, have been, from time to time, varied as policy seemed to dictate. Since the year 1816, no material alteration has been made in respect to the conditions of sale, although there is a great change as to the effect of the lien. In section 2 of the "act regulating judgments and executions," passed January 21st of that year, it is enacted: "That the lands, tenements, and real estate of the defendant shall be liable to the satisfaction of the judgment from the first day of the term in which said judgment is obtained," etc. In a *proviso* to section 7 of the same act, it is declared: "That judgments voluntarily contested in open court shall only have a lien on lands, tenements, hereditaments, from the day on which they are actually signed or entered." No time is specified within which the plaintiff shall sue out his execution in order to receive the benefit of his lien. He may do it whenever it suits his convenience. It is worthy too of notice, that, although by this act, all previous laws regulating judgments and executions are repealed, yet it is confined in its operations to judgments *only*, which may be *thereafter* rendered—the legislature being peculiarly careful to provide that judgments rendered *before* its enactment, should be collected according to the laws in force at the time of their rendition.

On February 24, 1820, the legislature enacted another law with a similar title with the one last named. This act, so far as it respects the subject of liens upon lands, tenements, and real estate," does not vary the act of 1816, except that it confines the liens of judgments upon lands to those lands situate in the county where the judgment is rendered, and provides that when the lands do not lie within the country where the judgment is entered, they shall be like goods and chattels, only bound from the time they are seized

McCormick v. Alexander.

in execution. This act repeals the law of 1816, but, in its operations, is confined to judgments which shall be *thereafter* obtained, leaving those *previously* obtained to be collected under the laws in force when they were rendered, except so far as relates to goods and chattels which are not to be sold without appraisal.

During the existence of this law, the two judgments in favor of, Evans and McCormick were obtained, the former being prior in point of time; and during the existence of the same law, the house and lot in Springfield were seized in execution at the suit of McCormick.

73] *By the act of February 1, 1822, "regulating judgments and executions," which repeals the act of 1820, the same principle as to the lien which judgments shall have upon "lands, tenements and real estate," is continued as in the last-named act. In section 2 it is provided, however, "that in all cases where the party obtaining judgment shall neglect for one year after the first day of the term, in which such judgment shall have been rendered, to sue out execution thereon, and cause the same to be levied according to the provisions of this act, such judgment shall not operate as a lien upon the debtor's estate to the prejudice of any other *bona fide* judgment creditor." This is the first law, of all those recited, which requires the plaintiff to sue out his execution within specified time, and it was manifestly the intention of the legislature to extend the provisions of this law to judgments which had been *theretofore* as well as to those which should be *thereafter* rendered. For, in section 16 it is expressly enacted, among other things, as follows: "And no judgment *heretofore* rendered, on which execution shall not be taken out and executed before the expiration of one year next after the taking effect of this act, shall operate as a lien on the estate of any debtor, to the prejudice of any other *bona fide* judgment creditor."

Under this latter law, and within six months after it took effect, Evans, on November 18, 1822, sued out his execution, which was levied upon the house and lot as has been before stated. By pursuing this course, he secured himself, as the law then stood, his lien upon the lands and real estate of the defendant, at least upon that part of it upon which the execution was levied. And had the property been sold under this execution, or had it been sold while the then existing law remained in force, there can be no doubt but

McCormick v. Alexander.

his judgment must have been first satisfied. This would have been the preferable or better lien.

Before the property was sold, however, the law then in force was repealed by the act of February 4, 1824, on the same subject. Section 17 of the last act provides, "that no judgment *heretofore* rendered, or which *hereafter* may be rendered, on which execution shall not have been taken out and levied before the expiration of one year, next *after* the rendition of the judgment, shall [74 operate as a lien on the estate of any debtor, to the prejudice of any other *bona fide* judgment creditor." It would seem, from an examination of this clause of the statute, that it would be difficult to have made use of words conveying a more definite meaning. Had the words "*heretofore* rendered, or which *hereafter* may be rendered," been omitted, we should probably come to the conclusion that the statute was intended to apply only to subsequent judgments. Where there is anything doubtful in the statute, it is the duty of the court, in expounding it, to give it such construction as will comport with what is supposed to have been the intention of the enacting power. And where the intention is manifest, but that intention is in part defeated by the use of some particular word or phrase, the court will look to the intention rather than the words. In the clause of the statute above referred to, however, there is nothing doubtful; nothing ambiguous; no words made use of which operate to defeat the manifest intention of the legislature. There is, in fact, nothing left for construction. We must apply it according to its literal meaning. Under this statute, the house and lot which had been levied upon by the several executions of Evans and McCormick were sold. The execution of Evans had not "been taken out and levied before the expiration of one year, next after the rendition of his judgment." The execution of McCormick had been "taken out and levied" within one year. The judgment of Evans, therefore, would not, under the law, operate as a lien, so far as to prejudice McCormick, provided the latter was a *bona fide* judgment creditor. That he was such creditor is not disputed. The advantage which Evans possessed at the time of his execution was lost by the repeal of the law then in force, and, under the present existing law, the lien of McCormick must be pronounced the better, or preferable lien.

It is objected, however, that the law of 1824 can have no effect upon the judgment of Evans, inasmuch as by the recovery of the judg-

McCormick v. Alexander.

ment, and the levy of the execution, he had a right vested in him of which he could not be deprived by legislative enactment. This objection presents an important inquiry, as it calls in question the 75] constitutionality *of the law above referred to, at least so far as relates to all judgments entered prior to the time of its taking effect. There may be, and there undoubtedly are cases, where it is proper, nay, where it is the duty of a court, to refuse to enforce a statute, on the ground that it is inconsistent with the supreme law of the land. Yet this ought not to be done, unless the statute in question is a plain and palpable violation of the constitution. It should be both against the letter and spirit of that instrument. So long as there is a doubt, the decision of the court should be in favor of the statute. Whenever courts, in doubtful cases, undertake to declare laws unconstitutional, they may, with propriety, be accused of usurpation. They lose sight of the object for which they were constituted, and interfere with the rights of the people, as represented in a different branch of the government.

In order to dispose correctly of this objection, it is only necessary to ascertain the nature of the right vested in Evans. It was not a right acquired by contract or agreement, it was not one which vested in him in consequence of the recovery of judgment alone; for, as has been before observed, it is not the necessary consequence of a judgment that it shall operate as a *lien* upon either real or personal estate. Whether it shall so operate, and how far, depends upon legislative enactment. Had this right vested in Evans by contract, he could not have been deprived of it, but by his own act. The legislature are restrained from passing any law which shall impair, or even change the nature of a contract.

Neither can a law regulating judgments and executions be considered as a law which enters into the nature of contracts, or which the parties have in view when they contract. Judgments are recovered as well for injuries sustained by torts, as for those which are sustained by reason of breach of contract. Judgments, too, are recovered not only for breach of contracts entered into in our own state, but for the breach of those which are made in other states and countries. When these judgments are once rendered, they operate equally as *liens*, without reference to the consideration 76] tion for which they are rendered. The law of the *place where a contract is made, or is to be executed, may be said, in a

McCormick v. Alexander.

certain degree, to constitute a part of the contract. It is always to be taken into consideration in construing, but never in enforcing the contract. A contract made in Virginia, and to be executed in that state, must be construed according to the laws of Virginia; but if that contract is enforced in Ohio, it must be done according to the laws of Ohio. This right, then, was not vested in him by contract, neither was it vested in him by the operation of a law, which could, with propriety, be said to constitute a part of the contract, if, perchance, his judgment was founded upon a contract.

Neither was this right founded in any principle of natural justice; because if it were founded in natural justice we might suppose all the laws on this subject would be similar in all countries, whereas we find them variant. Further, if natural justice had anything to do with the case, it would seem to dictate that the debt first contracted should be first paid, whereas we well know that the priority of the judgments does not at all depend upon the priority of the demands upon which they are founded. If any creditor suffers, it is generally the one who is most indulgent. Inasmuch, then, as this right was vested in Evans, not by any contract of his own—not by any principle of natural justice—but by the mere operation of a law, which can not, with propriety, be said to enter into the nature of, or constitute a part of the contract, I see no reason for saying that the legislature had not power to repeal this law, thereby depriving him of his right. To determine otherwise would be to curtail very much the power of legislating. It is believed that no laws, especially in new states, are more frequently revised and amended than those relating to judgments and executions. In the short space of eight years, there have been no less than four different statutes on this subject in our own state, each succeeding one repealing the former. Whether such frequent changes are dictated by sound policy, it is not for the court to say; and we are not prepared to say that these several statutes are or were in whole or in part unconstitutional. It has long been a part of our system, that real estate should not be sold under execution, *without valuation. Should the legislature repeal this [77 provision of the statute, no doubt an immense majority of the people would say, and with reason, that such repeal was impolitic, but few, if any, would say it was in violation of the constitution.

Another objection which has been urged, is, that by giving to the statute its literal meaning, manifest injustice will be done.

McCormick v. Alexander.

To this it may be replied that so far as relates to the case before the court, Evans and McCormick have equal equity. They both appear to be *bona fide* judgment creditors, equally in justice entitled to a satisfaction of their debts. If but one only can be satisfied, it must be him who has obtained a legal advantage. It is easy to conceive, however, that great injustice may be done in consequence of this statute. A creditor previous to 1820 may have recovered a judgment against his debtor. In one year and a day after its rendition he may have taken out his writ of *fiery facias* and caused it to be levied upon the real estate of his debtor. Repeated attempts may have been made, under the writs of *vendi. et alias vendi.* to dispose of the property, until at length, in 1824 or 1825, a sale is effected. But the creditor, who for five years has been striving to avail himself of his judgment, finds the property of his debtor swept from him and paid over to another, who recovered a judgment subsequent to the "first of June, 1824." Again, a creditor previous to the year 1820 may have long had a demand against his debtor. At length he commences his suit and recovers judgment. Having proceeded thus far, being willing to indulge his debtor, and resting secure in his lien, he takes no steps to collect his judgment. At length, under the law of 1822, being fearful of losing his lien, he sues out his execution and seizes upon the lands of his debtor. These lands are not sold until after June 1, 1824, and then the avails are taken to satisfy a judgment, not only junior in point of time, but a judgment recovered upon a debt contracted long subsequent to the rendition of the prior judgment. The indulgent creditor loses his demand, while the one who is less so is rewarded for what is termed his diligence. These considerations, however, are more properly addressed to a legislature, whose 78] province it is to make, than to a court *whose duty it is to expound law. That the statute may, in some instances, operate unjustly, is no reason why it should not be enforced.

Upon the whole, the court are of opinion, as before expressed, that the *lien* of McCormick is the better *lien*, and that judgment must be entered for the plaintiff.†

†NOTE BY THE EDITOR.—For a summary of the law of judgments and other liens, and of the rules as to priority between incumbrances, see note a, x. 74, and the case to which the note is appended. This decision reaffirmed, iii. 336. Same doctrine, vi. 30. See also iii. 136, that a levy under an elder

Fitch v. Heirs of Dunlap.

ELISHA FITCH v. HEIRS OF JAMES DUNLAP.

Where a newspaper is printed in a county, it is sufficient for a sheriff to advertise sales upon execution in it. Advertisements need not be set up in other places.

THIS case was adjourned from Ross County Supreme Court. A motion was made to confirm a sale of lands made by the sheriff upon execution. The lands were situate in the county of Ross; and it was proved that the sale had been advertised for the time required by law, in a newspaper printed in the county, and of general circulation within it. But no advertisements had been set up, either on the court-house door or elsewhere. It was suggested that this also was required by law, and to remove all possible doubt as to what should be the practice, the final decision of the motion was reserved to be made in this court.

By the COURT:

The provision of the statute is, that notice shall be given "for at least thirty days before the day of sale, by advertisement in some newspaper printed in the county, or, in case no newspaper be printed within such county, then in some newspaper in general circulation therein, and by putting up an advertisement upon the court-house door, and in five other places in the county, two of which shall be put up in the township in which such lands and tenements lie."

It is suggested that the terms of this act require the advertisement to be set up on the court-house door and at the other places named in the law, in all cases of sale of lands upon execution. A different practice has prevailed in most, if not in all, parts of the state;

judgment, though after its year, has priority over a junior judgment levied within its year, if the elder's levy was made before the junior was rendered.

Between several judgments not levied within a year, there is no priority, and the one first levied afterward gains a priority, iii. 336 and v. 398. For other decisions under this statute, see ii. 135, 295; ix. 142; xiv. 318; xvi. 533; xvii. 578.

Reed v. Carpenter.

79] and the court think that *the practice is a correct one. The terms of this statute are somewhat ambiguous; but where that is the case, the construction should be preferred that may work the least mischief or inconvenience. The member of the sentence preceding the disjunctive "or" contains a full and ample provision for giving notice of sales upon execution. The disjunctive is introduced to provide for cases not embraced in the first provision; and the terms, as well as the grammatical construction of the sentence, are both satisfied by referring the direction for setting up advertisements to the latter case only. Where a newspaper is printed in the county, it is sufficient to advertise in that paper; but where no paper is printed in the county, then the advertisements must be set up—one on the court-house door, five in other places in the county, two of them in the township where the land lies. The order for confirming the sale is accordingly made.†

CONRAD REED v. SAMUEL D. CARPENTER.

In replevin, a plaintiff may appeal from a voluntary judgment of nonsuit.

THIS was an action of replevin, adjourned from the Supreme Court of Huron county, upon a question whether the appeal was correctly taken.

The suit was brought in the common pleas. The plaintiff replevied the property, and on the return of the writ filed his declaration. The defendant pleaded *non cepit*, with notice of special matter in bar. At the term when, by the rules and usages of court, the cause stood for trial, the plaintiff became nonsuit, and judgment of nonsuit was rendered against him. At the request of the defendant a jury was impaneled to ascertain the value of the property replevied. A verdict of the value was returned, for which judgment, with a penalty of fifty per cent., was rendered. The plaintiff gave notice of appeal, executed a bond, as required

†NOTE BY THE EDITOR.—One insertion, thirty days before sale, is sufficient, xiii. 120; xvi. 563. For another decision touching this notice, see ix. 19.

Reed v. Carpenter.

by law, and brought up the record to the Supreme Court, where the cause was docketed. The defendant *moved to quash [80 the appeal upon the ground that the law did not permit the plaintiff to appeal from a voluntary nonsuit.

LATIMER, WILLIAMS, WHITTLESEY, and NEWTON, in support of the motion :

The counsel for the defendant submit that the appeal is not sustainable, and that the appeal ought to be dismissed for want of jurisdiction.

A remedy by which one or two litigants may acquire the custody of property, in the peaceable, and apparently in the legal possession of the other, is so harsh, and so liable to abuse, and may be made the instrument of so much injustice, that policy requires its discouragement.

The legislature have adopted this policy, and from the manner in which they have treated the subject, it is manifest that it should be employed, in those cases only, where the right is clear, and it is equally manifest that it should not be adopted to settle rights which are doubtful and contingent.

With these feelings the rights of the parties are so modified by the statute (especially the statute in force at the institution of this suit), that the common law practice is abrogated, and a new course prescribed, by which a judgment for the value and damages is rendered against the plaintiff in case of failure, and this judgment is to be considered, not as an adjudication of the rights of the parties, but as a penalty upon the plaintiff, for rashly employing a remedy not adapted to his case.

If we have illegally taken this property, he may still recover his damages in trespass, but he is not permitted to employ the arm of the law to take property from our possession, without abiding the risk of his proceeding, and paying the forfeit if he fail in maintaining his rights.

The title of the vessel in dispute has never been acted upon, and he may still recover his damages for the taking in an action of trespass; the reason why he may not make another replevin, is, not because a former judgment concludes the rights of the parties, but because the possession of the property is already his.

If this view be correct, we can discover no reason to distinguish *the practice in this suit from an ordinary nonsuit. We [81

Reed v. Carpenter.

repeat, the rights of the parties to the property have not been adjudged; as in all cases, if the plaintiff fail, he incurs the liability of the costs, which were intended as a penalty for asserting unfounded claims; so here he incurs a penalty similar in kind, and only differing in degree because the nature of the remedy requires a greater security against abuse.

It may still be urged that the suit requires both parties to be actors—that any termination of the suit necessarily concludes their rights; if such be the opinion of the court, then we submit that the plaintiff, by becoming nonsuit, has made a voluntary abandonment of his claim, which, in this suit, he is not permitted to revive; that the only open question is the value of the vessel, which the statute secures to us, and which alone he will be permitted here to contest.

HOPKINS, in support of the appeal:

It is contended, on the part of the defendant, that a nonsuit of this kind can not be appealed from. In answer, it might be conceded, that if it were any other action except replevin, the position taken by the defendant's counsel would be tenable; for in every other action the plaintiff would have no need of appealing. He could reinstate himself before the same court by commencing a new action, and suffer no injury by the former, except the trifling cost which had accrued thereon, and thereby have his day in court. But in the present action the defendant is virtually plaintiff, because both parties are actors in it. Under this view of its nature, this court has recognized the genius of the action by retaining the cause in this court. This is giving the defendant the full advantage of the plaintiff, which he has become in fact. The next question is, could the defendant have appealed and had a trial before this court, had he made default and a judgment been entered in favor of the plaintiff for his damages on that default? I think the court would have entertained no doubt in the last case; for by section 99 of the judiciary act, in civil cases, an appeal shall be allowed of course to the Supreme Court from any judgment [82] or decree rendered in the court of common *pleas, in which such court had original jurisdiction. Now shall the plaintiff, after having become defendant by operation of law, for he must be so considered by section 52 of said act, which recites that "it shall be lawful for the plaintiff in replevin, and for the defendant

Reed v. Carpenter.

or tenant in every other action, to plead in any court of record, with leave of said court, as many several matters as he shall think necessary for his defense," etc., be put in a worse situation than he would have been had he been the original defendant? I think the genius of our laws and that of the action will not allow it. The whole cause is, I think fully in this court, over which the court can exercise all its judicial authority.

By section 3 of the judiciary act, the court are not confined, in their jurisdiction, to the particular processes therein named, but may issue all other writs not specially provided for by statute, which may be necessary to enforce due administration of right and justice throughout the state, and for the exercise of their jurisdiction agreeable to the usages and principles of law. By the authority given here, the court have full power to issue a judicial writ out of the original record to replevy as often as the plaintiff becomes nonsuit, which is given by the usages and principles of common law, and by which the return of the property to the defendant was never irreplevisable, in this action, whether the nonsuit of the plaintiff had been before the avowry or after, or before or after issue joined; because where the defendant had judgment for a return on a nonsuit, though after verdict, that judgment was not founded on the verdict, but on the default of the plaintiff by withdrawing himself at any continuance day after the verdict; so that though the defendant had return, yet he had not the justice or legality of his caption established by such judgment; and therefore as long as the caption and detention was not determined by the judgment of the court so long they allowed the plaintiff, after his own nonsuit, to take a new replevin. Gilbert's Law of Replevin, 233. By deduction from both the above authorities, this court has full power to issue a new replevin; or this court has, by the above section of our statutes, authority to follow the usages and principles of laws which were in force and in use at *the [83 adoption of the constitution of the United States, and which are in no wise invalidated by any law or custom of our state, to issue a writ of second deliverance, which is given by statute of West. 2, c. 2, and, like that of the new replevin, is a judicial writ issuing out of the original record of the first replevin, in which the nonsuit was; or this court may waive the formality of either of the above writs, issuing, in fact, as they do, in cases of writs of inquiry of damages, and order the sheriff again to call the plaintiff in this court, and,

Reed v. Carpenter.

if he answer, the cause shall be fully before this court on its original merits and pleadings. By all the usages and principles of law, from which we can gain any authority for a precedent, the plaintiff could always be reinstated before the court, after his nonsuit, and have his day in court upon the merits of his cause; and if he can not, in this instance, it will be an anomaly in the annals of civilized jurisprudence. Suppose the judgment, in the present case, had been *de retorno habendo*, with fifty per cent. damages, by the court for the defendant, would there have been any doubt in the minds of the court but that a new replevin, or a writ of second deliverance, or some other appropriate and adequate proceedings might have been had by the plaintiff, to bring his whole cause before the court and put the defendant upon the defense of the justice and legality of his caption and detention of the property. An assessment of the value of the property is, by our statute, awarded to the defendant instead of the judgment *de retorno habendo*. The principles of law, then, are not at all altered, and the same proceedings may be had as upon that judgment.

It was not, nor could it have been the intention of the legislature, that by changing the form of the judgment from a return of the property in specie to an assessment of the value to the defendant, should take away all the common-law usages, and former precedents, which have been so satisfactorily established in principle, by all former ages, when the action of replevin has been known. One of the vital principles of this action is, to try the justice and legality of the defendant's caption and detention of the property. The legislature could never have intended that such a judgment [84] of nonsuit should be final and irreplevisable, in the first instance, and all remedy against the wrong-doer gone, with not only the loss of his property, but fifty per cent. by way of fine for his non-attendance. If this was the intention of the legislature, they have completely destroyed one of the most salutary actions for the unjust caption and detention of property which was known to the law.

In the present case, the defendant denies the caption, and sets forth three several matters in a notice which is no part of the record. Now, upon which of these several counts, as it were, has the court below assessed; or will this court re-assess the value of the vessel to the defendant? There is no record authority to ground that judgment upon. He has spread nothing upon the record to

Reed v. Carpenter.

show that he had any right to have the value of the property assessed to him. Therefore, the moment the plaintiff is out of court; the defendant is also, unless his word is tantamount to a record.

Had the defendant set forth the several matters, in an avowry, which he has in his notice, under the issue of *non cepit*, it would have been bad on general demurrer, upon a motion in arrest or upon error. The avowry being in the nature of a declaration, the avowant, as all other plaintiffs in all other actions, ought to show to the court a definite right in himself to have return, or the value of it, by the record of the case before the court; because, unlike all other actions in the law, he turns round, when the plaintiff has become nonsuit, and continues on the action to judgment, as plaintiffs do in all other actions on the default of the defendant. It would be a perfect novelty in law, either in debt or *assumpsit*; where the defendant had pleaded an offset, that after the plaintiff became nonsuit, and out of court, the defendant should proceed to obtain judgment for a larger sum of debt or damages; for the judgment is, that the defendant go without day, and the plaintiff in mercy, etc. But in the replevin alone do both parties act, and when one party makes default the other proceeds on with the suit; for, by the above section 52 of the judiciary act, the defendant is considered to act most properly as plaintiff. Here is a plain and evident exception of this action from the laws and rules which govern all other actions, and the laws and rules which govern nonsuits of all other actions are not at all applicable to this [85] action. If they were in any way applicable, the defendant could not appeal from a judgment on his own default, and therefore the provision of section 99, above recited, would be a nullity.

This case is a new case, and will, in all probability, not only stand as a precedent and authority for all the inferior courts throughout the state at the present day, but will be considered as a law to govern posterity. And what will future generations think of a decision where no positive statute applicable to the case, no course of common law or ancient statute was pursued, and no record evidence of any definite right which the defendant had to the property appears, and still the plaintiff could not have the justice of his cause tried? If such a precedent should be established at this time, they must be struck with the injustice of the practice, and strike out and pursue a contrary course shortly, or this action must become obsolete altogether.

Reed v. Carpenter.

This court has, from section 3 of the judiciary act, authority to make new writs where none can be found appropriate, like the old *officina brevium*, or establish any new course of practice for the advancement of justice or equity throughout the state.

It would be highly opprobrious to a republican government, and especially to a state whose greatest boast is that she has cast off all the shackles of ancient monarchial barbarism, and that her citizens are alone to be protected and governed by equal laws which give every man his due, if a solitary case could be found upon her records in which a villain had triumphed over justice for want of a precedent to guide and direct the injured party, in case of accident, or against the finesse of artful knavery. Yea, more so would it appear, when viewed in comparison with the ready means afforded the parties, which were ever devised, on the spur of the occasion, by the ancient judges of that monarchy, in times of ignorance and ferocity, who adopted a course of practice so conformable to the spirit of justice that, by a succession of ages it became settled law, that if any defect of justice happened at the trial by surprise, inadvertence, or misconduct, the party might have relief in the court above by obtaining a new trial; or if, not-86] withstanding *the issue of fact be regularly decided, it appeared that the complaint was not objectionable in itself, or not made with sufficient precision and accuracy, the party might supersede it by arresting or staying the judgment. And the courts adopted, even in those early times of monarchy, a maxim, that in all cases of moment, where justice is not done upon one trial the injured party is entitled to another. And those judges, if they transcended their authority, they erred on the side of justice, in whose aid they did it, and that posterity might have a guide and example.

And this court, although they may at this time have to act without any direct authority in this state, are about to make one for future generations; and it would be altogether more satisfactory, in forming a precedent, that it should be in aid of justice, where no positive statute could be found to govern them, rather than the party should be driven from the court, without an investigation of his complaint, with great loss and injury, and the doors of justice closed against him forever. And it is much to be hoped, that among the innovations of this enlightened age, while the courts forego and cast off many of the ancient formalities of coming to

Reed v. Carpenter.

justice in a cause, that they do not lay aside the substance, and substitute the shadow for the reality.

It is urged by the defendant's counsel, that this is an action altogether given by the statute of this state, and that no common law principles or ancient statute comes in to govern any part of the proceedings in it. But I would ask the gentlemen in what part of the statute the form of the declaration, the plea, the kind of testimony to be given, are to be found? How far, I would ask, could this, or any other court, proceed in the unsettled state of practice in this state, were they to be confined to the letter of the statute only, and call no other authority or precedents to their aid? The statute merely gives the skeleton of the action of replevin, and the usages and the principles of common law and ancient statutes, in force at the adoption of the constitution of the United States, must give that cadaverous figure life, strength, and activity. Prescribe these and you prescribe all common sense. Even the incipient and all the subsequent movements can not be had without them.

*It would derogate from the dignity of this court to be thus [87 confined to the letter of the statute, and assimilate it to that of a common justice of the peace, who is confined to one act only, and who does not think himself authorized to bring to the aid of his judgments any principles of common law, and often very little common sense.

Opinion of the court, by Judge HITCHCOCK :

At an early period of the judicial history of the State of Ohio, it was determined that an appeal could not be sustained from the court of common pleas to the Supreme Court from a judgment of nonsuit.

The reason which operated upon the court in giving this construction to the statute undoubtedly was, that such judgment did not conclude the rights of the parties. It was not final. The plaintiff might, at any subsequent period, recommence his action, and prosecute it to final judgment. The judgment of nonsuit would be no bar. So uniform were the court in enforcing this rule, that the legislature thought proper to interfere, and on February 4, 1813, enacted a statute, providing, in substance, that where the nonsuit was ordered by the court of common pleas in consequence of a defect of testimony, or for any other cause, the

Reed v. Carpenter.

plaintiff should have the right of appeal. From this statute no other inference with respect to the intention of the legislature, than this, can be drawn, that where the nonsuit was voluntary, the plaintiff should not have this right; and from that period to the present, such has been the uniform decision of the court. Such being the case, the court would not hesitate to sustain the present motion, were the action of a different description, and did we suppose that by pursuing that course we should be carrying into effect the intention of the legislature, in securing to parties litigant the right of appeal.

The action of replevin is one of a peculiar nature; both parties are actors. In this state it is regulated by statute. By section 5 of the act of January 22, 1813, the statute in force when this suit was commenced, it is provided, that "if the plaintiff becomes nonsuit, or on trial the jury find the defendant 88] not guilty of taking the goods and chattels *from the possession of the plaintiff, or find that such goods and chattels belonged to the defendant, the value of such goods and chattels shall be ascertained by the jury, and the court shall render judgment for the defendant, for the value so found, with fifty per cent. damages, and interest from the time of their being replevied." By this section it appears, that after the plaintiff becomes nonsuit, a judgment is not thereupon, as in ordinary cases, rendered for the defendant to recover his costs. The situation of the parties is changed. The defendant becomes plaintiff, or actor. He claims to recover not only his costs, but also the value of the goods and chattels replevied, together with damages. A jury is impaneled to ascertain this value, and return a verdict accordingly. Upon the verdict of the jury the court render a judgment for the value of the property, together with fifty per cent. penalty, or damages and interest.

This judgment is final. It is not, strictly speaking, a judgment of nonsuit. The plaintiff can not afterward recommence his action of replevin, for the property is already in his own possession. It is a judgment whereby the defendant recovers the value of the property and damages after he becomes actor in the case; and in its effects may, with more propriety, be assimilated to a judgment by default, than to a judgment of nonsuit. The propriety of sustaining an appeal, under our statute, from a judgment by

Ellis v. Bitzer.

default, has never been doubted, and the same reason applies for sustaining the appeal in the present case, as in one of that description.

The motion to dismiss the appeal is overruled, and the cause continued.

*ELLIS v. BITZER.

[89]

Where, in an action of trespass against five, plaintiff accepts a note from two for a sum of money, to be paid at a future day, in satisfaction as to them, but not to operate as a satisfaction for the other defendants, the cause of action is discharged as to all.

THIS was an action of trespass, assault, and battery.

The original writ was sued out against five defendants—Bitzer, Townsend, Whitacre, Williams and Adkins. As to Williams and Adkins it was returned *non est*. The declaration was filed against the other three making this suggestion. They appeared and pleaded not guilty. They also pleaded two special pleas, the substance of which were, that after the commencement of the suit, one W. S., as agent for the plaintiff, made an agreement with the defendants, Williams and Adkins, to receive their note for one hundred and fifty dollars, payable at a future, but certain day, in satisfaction for the trespass as to them, and to forbear further prosecuting the suit against them; and that in performance of this agreement, Williams and Adkins made and executed their note for one hundred and fifty dollars to Smith, and delivered it to him, who, as agent for the plaintiff, accepted it, in satisfaction for the plaintiff. Issues were joined upon both these pleas. The testimony was reduced to writing and agreed by the parties, as follows:

W. S. testified that he was authorized by the plaintiff to conduct the suit against the defendants, but had no special authority to make a compromise. He made the settlement with Williams and Adkins, and took their note payable to himself, in consideration of which he agreed that they should not be further prosecuted. He believed he had influence enough with the plaintiff to prevail upon him to acquiesce in what he had done. The note had not been paid, and no offer had been made to restore it to the makers. It was in the hands of the plaintiff's attorney.

Ellis v. Bitzer.

J. E. testified that when the compromise was agreed upon, it was distinctly understood to be made for Williams and Adkins alone, and not to be a satisfaction for the rest, Williams and Adkins were to be entirely discharged from the civil suit, and the prosecutors were to do what they could to make the prosecution as light as possible.

J. G. testified the same as the last witness, and in addition, that 90] after the note was given Smith directed Eaton to *indorse eighty-five dollars upon the note, as paid; Smith at the same time said the real agreement was that sixty-five dollars was to be received, but that the note was given for one hundred and fifty, that the plaintiff might the more readily obtain from the others a considerable sum upon compromise. But this he did not wish disclosed.

J. M. G. testified that he heard the plaintiff say to his attorney, "What S. has done I suppose I must agree to."

As to Williams and Adkins, the suit had neither been prosecuted nor discontinued. The plaintiff's counsel produced the note in court, and offered to cancel it.

In the court of common pleas a verdict was taken for the plaintiff, subject to the opinion of the court upon this point reserved, whether in law the testimony adduced supported either of the special pleas. The court of common pleas gave judgment for the defendants, and the plaintiff appealed. In the Supreme Court of Belmont county, where the cause originated, the cause was submitted to the court upon the foregoing statement of the testimony, and an agreement as to the sum for which judgment should be given, if the court should decide for the plaintiff. The decision of the cause was adjourned to this court.

HAMMOND, for defendants:

It is settled that an agreement not to sue upon a particular cause of action amounts to a release. It can not be pleaded as a release, but the fact may be pleaded, and its operation, upon being proved, is to bar the plaintiff's action. *Cuyler v. Cuyler*, 2 Johns. 187; *Harrison v. Wilcox and Close*, Id. 449.

The agreement not to sue in this case was made upon good consideration. The note accepted reduced the plaintiff's claim for the injury sustained to a certain amount, and totally changed its character. By making the note on one side, and accepting it on the

Ellis v. Bitzer.

other, the agreement was completely executed. The payment of the note was not necessary to the making it a satisfaction, because that was not a part of the agreement.

WRIGHT, for the plaintiff:

Accord without satisfaction is not a good plea. A bare *prom- [91
ise of future satisfaction is not good. If it remain executory it is
no bar. 1 Esp. N. P. 239; 1 Strange, 23, 573; 1 Bac., Accord, A,
24; Cro. Eliz. 304, 306; 2 Term, 246; 5 Johns. 386; 3 Johns. Cas.
143.

An agreement not to sue a single debtor has been held to oper-
ate as a release. But where two are liable, an agreement not to
sue one does not operate to bar a suit against the other. 2 Salk.
575; 8 Term, 168; 2 Saund. 48, note 1; 2 Johns. 449; 5 East, 232.

Opinion of the court, by Judge SHERMAN:

This case is presented to the court in the form of an agreed case,
but it is so only in name. The parties, instead of agreeing upon
the facts, have agreed upon the testimony which the defendants
could give in support of their second and third pleas, and ask the
determination of the court whether that testimony sustains either
of those pleas. This is in effect submitting the issues in fact to the
court instead of the jury, upon a written statement of the testi-
mony of the witnesses, a course of proceeding not sanctioned by
our practice. The parties, however, having agreed that if the evi-
dence, contained in the written statement, does not support either
the second or third plea, that judgment may be entered in favor
of the plaintiff for a specified sum, the court will not delay the par-
ties, or put them to the expense of having the finding of a jury
upon the issue in fact made upon those pleas.

Upon the pleadings and proofs in the case three questions have
been made. Was the note mentioned in the plea executed and
received in satisfaction of the trespass complained of in the decla-
ration? Is a discharge of one of several joint trespassers a dis-
charge of the whole, where the parties have expressly stipulated
it shall not have that effect? Is a note given for a trespass, which
remains unpaid and in court to be canceled, a satisfaction?

The first is purely a question of fact, and depends upon the tes-
timony. The proof is that Smith, the agent of the plaintiff to
conduct the suit, but without any special authority to settle, com-

Ellis v. Bitzer.

promised with Williams and Adkins, who were jointly concerned 92] with the defendants in the trespass *complained of, and whose names were inserted in the writ, took their note for one hundred and fifty dollars, and agreed to forbear to sue them; that it was distinctly understood that the compromise was only for Williams and Adkins; that they were to be wholly discharged from liability for damages on account of the trespass, but that it was not to be a satisfaction for the other joint trespassers, and that the plaintiff, after being informed of the compromise made by his agent, said he supposed he must be bound by what Smith had done. Without going into a particular discussion of the facts, the court are satisfied that the note mentioned in the third plea was executed in satisfaction of the trespass complained of, so far as Williams and Adkins were concerned therein; and that it was received by the plaintiff in satisfaction is apparent from the fact of the note being in his possession and by him brought into court, as well as from the testimony that it was so received by Smith, his agent for conducting the suit. It was executed and received with the intent and for the purpose of discharging Williams and Adkins, the makers, from all further liability on account of their being jointly concerned with the defendants in the trespass, but with an express stipulation that it should not discharge the other co-trespassers.

That a release of one of several joint trespassers operates a discharge of all is a position too clear to admit of doubt. The authorities on this point are uniform, full, and clear. 1 Hob. 66; Co. Litt. 232, a. An accord and satisfaction of a joint trespass by one is good for all concerned. The act of one of several joint trespassers is the act of all; they all unite to do an unlawful act, and each is responsible for the acts of the others. The plaintiff may elect to sue them jointly or separately, and may pursue them until he has obtained satisfaction, but he can have but one recompense in damages for the same injury. The plaintiff here agreed to take the note of Williams and Adkins, two of the trespassers, for one hundred and fifty dollars, and to forbear to sue them; the note was given, and it was understood they were fully discharged, and he has thus made his election not only as to the amount he would receive as a recompense for the injury he sustained from 93] the assault and battery committed *by the defendants jointly with Williams and Adkins, but also of the persons from whom he

Ellis v. Bitzer.

would recover that recompense. He has been satisfied for the trespass committed upon him, and to permit him to recover in this action would give him another recompense for an injury already satisfied. It can make no difference that it was part of the agreement between the plaintiff's agent and Williams and Adkins, that the giving and receiving the note mentioned in the pleas was not to be a satisfaction for the other trespassers. Each joint trespasser being liable to the extent of the injury done by all, it follows as a necessary consequence that satisfaction made by one, for his liability, operates as a satisfaction for the whole trespass, and a discharge of all concerned. Williams and Adkins could make no agreement impairing the legal rights of the defendants, nor cede to the plaintiff the privilege these defendants had of availing themselves of any matter forming a legal defense to this action. The accord and satisfaction mentioned in the third plea operated in law as a discharge of these defendants from liability for the injury complained of by the plaintiff, and it was not in the power of other persons to deprive them, by any agreement of theirs, of the benefit of this legal discharge. The plaintiff can not complain, for he has agreed upon the quantum of damages he sustained by the trespass, and has received the note of Williams and Adkins in satisfaction from and discharge of them; and they can not complain, for, as joint trespassers, they are liable to make the plaintiff a full recompense in damages for all the injury he sustained by the commission of the trespass.

The remaining question is, whether a note given for a trespass which remains unpaid, and in court to be canceled, is a satisfaction. An accord without satisfaction is not good. The party must not only have agreed to accept, but he must actually have accepted, before it will amount to a satisfaction in law. A naked promise to make satisfaction at a future day, for a trespass, is not a bar to an action brought to recover damages for that trespass. It must be shown that the promise has been executed, by the payment or delivery of what was agreed to be received in satisfaction, or the injury in law remains, and with it the right to re- [94 cover a recompense. In this case the evidence shows that the accord was executed and the satisfaction actually made. The plaintiff agreed to accept the note of Williams and Adkins, two of the joint trespassers, for a specified sum, in discharge of their liability for the trespass. The note was accordingly made and

Beggs v. Thompson.

accepted by the plaintiff. The discharge of Williams and Adkins was immediate upon giving the note, and did not depend upon payment of the money. The agreement was to receive the note in satisfaction, and the accord was executed when the note was made and delivered. The contract of the parties looked only to the execution and delivery of the note, and Williams and Adkins were to be discharged, not on the payment of one hundred and fifty dollars, but upon their giving to the plaintiff their note for one hundred and fifty dollars. It was not an accord without satisfaction, or a mere promise to make satisfaction at a future day, but an adjustment between the parties of the amount of recompense to which the plaintiff was entitled, and a present satisfaction. The plaintiff's right of action for the trespass was gone by the acceptance of the note, and it will not revive, either against the makers or the other joint trespassers, by the non-payment of the money at the time stipulated in the note, or by the plaintiff producing it in court and offering to cancel and deliver it to the defendants. The plaintiff has, by his agreement, substituted one cause of action for another, and he can not resort to both, or either, at his election. He has accorded with, and received satisfaction from part of the joint trespassers, and thereby discharged the whole; and he can not deprive the defendants of the benefit of that discharge by offering to surrender that which he has received in satisfaction for the trespass. Judgment must be entered for the defendants on the third plea.†

95]

*DAVID BEGGS v. JOHN THOMPSON.

A purchaser of lands at sheriff's sale can not sustain an action of trespass for the crops where he does not obtain possession by ejectment.

THIS was an action of trespass, *quare clausum fregit*, adjourned from the Supreme Court of Columbiana county, upon a case agreed, embracing the following facts:

†NOTE BY THE EDITOR.—See note to Lathrop v. Wrigat, ii. 33.

Beggs v. Thompson.

Thompson, the defendant, mortgaged the premises in question to Robert Patterson and others. A *scire facias* was prosecuted upon the mortgage; the land taken in execution, sold by the sheriff, and purchased by the plaintiff. At May Term, 1823, the court made an order confirming the sale, and the sheriff made a deed to the plaintiff. The defendant was in possession; the plaintiff demanded possession of him, which was refused. He then served a notice on him in writing, and instituted a proceeding in forcible detainer, in which the plaintiff obtained a judgment; that was reversed on *certiorari*. In April, 1824, the defendant, who had been in possession of the premises, and used them and received the crops from the time of the levy, abandoned that possession, and the possession was taken by the plaintiff; after which he brought this action to recover of the defendant for the rents and profits of the land. And whether it could be supported was the question submitted to the court.

J. C. WRIGHT, for the plaintiff:

This is, in substance, an action of trespass for mesne profits. It is objected to the plaintiff's having judgment:

1. That he can not recover without having obtained the possession by judgment and *habere facias*.

2. That he can not recover, after possession, for any time *before* possession, or any rate for any time anterior to the time of the demise laid in the declaration in ejectment.

A person having title may enter peaceably into possession, without judgment or suit, and having so entered, his possession inures according to his title. *Jackson v. Horiland*, 13 Johns. 235, Adams on Eject. 98.

A sheriff's deed relates back to the time of sale. *Jackson v. Dickinson*, 15 Johns. 309; Adams Eject. 71.

Where once an entry has been made, it will have relation *to [96 the time the title accrued, so as to enable the claimant to recover the mesne profits from that time. Adams Eject. 335.

A sheriff, though not bound to do so, may put a purchaser into possession, and any person having title may enter into possession, if they can do so without breach of the peace. Chief Justice Gibbs, in *Rogers v. Pitcher*, 6 Taunton, 202, says, "I am aware it has, in several places, been said, that the tenant in *elegit* can not obtain possession without an ejectment, but I have always been of a dif-

 Beggs v. Thompson.

ferent opinion. *There is no case in which a party may maintain ejectment, in which he can not enter.* The ejectment supposes he has entered; and that the lessor may do it by another, and not enter himself, is not very intelligible." This is supposed to be the correct doctrine on the subject; and would not the contrary doctrine border upon absurdity? A trespasser intrudes into my farm, and uses and abuses it for several years, until my patience being exhausted, I threaten to bring ejectment. When he abandons the place, and is about to clear out, I can not sue him for the trespass, although complete. I must bring ejectment to recover possession of the premises that are left vacant, on purpose to let me enter to avoid the necessity of the suit; and in the meantime the trespasser leaves the country; my remedy for the mesne profits is gone, and I have a bill of costs to pay in the ejectment! This is unreasonable; and where the reason of the rule fails, or rather the want of reason, shows that the rule was never *founded in law*.

The refusal of a judgment debtor, whose land is sold on execution, to give possession, makes him a trespasser. He is not a tenant, or liable for use and occupation, which, unless upon express promise, is a statutory remedy. 11 Geo. ch. 11, p. 19, adopted in New York laws, vol. 1, p. 146, but never adopted in Ohio. He is liable to be turned out as a trespasser, and is responsible, in *that character*, for the mesne profits. *Smith v. Stewart*, 6 Johns. 49.

A lessor of the plaintiff in ejectment may bring trespass for the mesne profits in his own name, or that of his anonymous lessee. If in his own name, he may recover for rents and profits for the 97] time anterior to the demise in the ejectment; *and he may do the same if the recovery in ejectment be against the casual ejector. *Adams Eject.* 330.

In trespass for the mesne profits, it is not necessary to prove a writ of *habere facias* executed. *Bul. N. P.* 87; *Adams on Eject.* 336. And in such case, where the judgment has been in favor of the casual ejector, and no *habere* executed, the defendant may controvert the plaintiff's title. 2 *Strange*, 960; *Esp. N. P.* 495. The defendant can not pay the money into court, because the action is for a tortious occupation, from the time the tenant had notice of the title of the plaintiff. 2 *Wils.* 115; *Esp. N. P.* 495. If the plaintiff seek to recover the profits antecedent to the demise, or bring his action against a precedent occupier, the record in ejectment can not be given in evidence, but the plaintiff *must prove his title and an*

Beggs v. Thompson.

entry on the land. Bul. N. P. 8; 2 Burr. 667; Adams on Eject. 334. It would seem, from these authorities, there could be little doubt as to the law in such cases. The action of trespass existed in use long before the action of ejectment, and give place to it only so far as necessary to try the right of *possession* to land, and effect a restoration of the possession to the owner, if ejected. This the action of trespass could not do; it only gave damages for the trespass till the time of suing out the writ. The action of trespass still remains with all the virtue it ever had. We may admit, for the sake of the argument in this case, that a *legal right* to possession does not carry with it evidence of *legal possession* sufficient to maintain trespass, because here the plaintiff was in possession before suit. The true rules are supposed to be: Where trespass for mesne profits is brought, a plaintiff who has recovered in ejectment, and seeks to recover only from the time of the demise laid in his declaration, the record in ejectment is conclusive; but if he seek to recover for a *longer time*, as to that longer time the title and possession are open to litigation; and where he seeks to recover, having obtained possession without ejectment, the whole subject, as to title, is open for controversy; except, that when the defendant is a judgment debtor, and the plaintiff a purchaser at sheriff's sale, the defendant can not set up an outstanding title in a stranger. 3 Caine, 188.

*LOOMIS and METCALF, for the defendant:

[98

Trespass can not be sustained for an injury to real or personal property without possession. In the case of personal property possession may be merely *constructive*; but in the case of real property the possession must be *actual*.

The general ownership of goods and chattels carries with it *prima facie* evidence of possession; but if the general owner parts with his possession, and a bailee have, at the time of an injury committed, an exclusive right to the use, the evidence of possession, by the general owner, is rebutted, and he can not maintain *trespass*, but case only. Putnam v. Wiley, 8 Johns. 432; Van Brant v. Schenck, 11 Johns. 385.

The general ownership of lands does not carry with it *prima facie* evidence of possession. *Actual* possession is an essential ingredient in the title requisite to support trespass *quare clausum fregit*.

A *right* of possession, not coupled with a possession *in fact*, at the time of an injury committed, is not sufficient. That action is

Beggs v. Thompson.

grounded upon an injury to the possession, and can not be maintained, unless the plaintiff has actual possession, though he may have the freehold in law. 2 Phil. Ev. 132, 133.

The adjudications upon this point are numerous, and appear, so far as our researches have extended, to have been uniform from an early period in judicial history to the present time. A brief review of authorities will test the correctness of this remark.

Only the person who has the possession *in fact* of the real estate, to which an injury has been done, can maintain an action of trespass, *quare clausum fregit*; a general property not being in the case of real property, as in the case of personal property, sufficient to found this action upon. 6 Bacon's Abr. 566; Bro. Tresp., pl. 38, pl. 315, pl. 346; 2 Lev. 209; 2 Bulstr. 268.

A person in whom the freehold of the land is can not maintain the action for an injury to the land whilst in the possession of another. 2 Roll. Abr. 554; 6 Bacon Abr. 566.

An heir at law may make a lease of land, descended to him before entry; but though he have an indisputable right of possession and an absolute estate, he can not maintain trespass until he have, by entry, regained the possession *in fact* of the land. Browning v. Beston, Plowd. 142.

If a man who once had possession in fact of real estate quit it, or be deprived thereof, he can not maintain an action of trespass, *quare clausum fregit*, for an injury done thereto, which was done betwixt the time of his quitting or being deprived of the possession, and his regaining the same by re-entry. Bro. Tresp., pl. 365, and 6 Bac. Abr. 567.

Possession alone is a sufficient title to sustain trespass, *quare clausum fregit*, against a wrong-doer. Van Nuys v. Ferhem, 1 Johns. Cas. 82.

It is possession at the time of the injury committed, and not at the commencement of the suit, that is requisite to maintain trespass for an injury to real estate. In fact, when an injury has been done to a person's land, whilst he was in possession, he may bring trespass after he has abandoned the possession, and sustain the action. Bro. Tresp., pl. 12; 2 Roll. Abr. 569; Plowd. 431; 6 Bac. Abr. 568.

The defendant in this cause having had peaceable and lawful possession of the premises at the time it is claimed, the plaintiff's title accrued, and the plaintiff never having had a possession in

Beggs v. Thompson.

fact until a period subsequent to the injury alleged, the foregoing authorities conclusively show that he can not recover in the form of action which he has elected. They clearly specify the injuries to which this species of action is to be limited; and define with certainty the title which is requisite to its successful prosecution. They clearly establish the fact that the law on this subject has been settled in England for centuries, upon principles free from ambiguity, and within limits exempt from doubt or uncertainty. But we rest not here. The decisions in our own country are equally clear, pointed, and conclusive.

This question was presented for adjudication in the case of *Campbell v. Arnold*, 1 Johns. 511. On the trial of that cause the plaintiff proved that in the year 1776 he was in the actual possession of the premises on which the trespass was committed; that at the time of the defendant's entry upon the land and the commission of the trespass, one Archibald was in possession as a tenant, under *the plaintiff, to whose agent he paid rent. [100] Upon the production of this evidence the defendant's counsel moved for a nonsuit, upon the ground that the plaintiff was not in the actual possession at the time the trespass was committed. The motion was overruled, and a verdict passed for the plaintiff. Upon a motion to set aside the verdict for misdirection of the judge, the court said: "The rule appears to have been long and well established that there must be a possession *in fact* of the real property to which the injury was done, in order to entitle a party to maintain an action of trespass *quare clausum fregit*. A general property in the case of real estate is not, as in the case of personal, sufficient to support this action."

Here is an express adoption of the principle for which we contend, and a direct restriction of the remedy by trespass, *quare clausum fregit*, to an invasion of the actual possession. A person having title to real estate, not coupled with possession, is not, by this decision, left remediless. Another form of action may be successfully prosecuted.

In the case of *Tobey v. Webster*, 3 Johns. 468, the authority of the preceding decision was expressly recognized, though Kent, Chief Justice, said he had been of a different opinion before looking into the cases, after which he concurred with the other judges in the opinion delivered in the case of *Campbell v. Arnold*. The principle that a party must have actual possession of real prop-

Beggs v. Thompson.

erty to enable him to maintain trespass, is also advanced in the case of *Stayvesant v. Tompkins and Dunham*, 9 Johns. 61.

The case of *Wickham v. Freeman*, 12 Johns. 183, establishes the principle that to sustain the action of trespass the plaintiff must show an actual possession of the premises, or that he is entitled in remainder or reversion, or in case the premises are vacant, that he has the legal title which draws to it the possession. The facts in this case show that the plaintiff was not in actual possession; that he did not claim in remainder or reversion, and the premises were not vacant. The action of trespass could not, at common law, be sustained by a remainder-man or reversioner; that remedy was given them in England and New York by statute. No such statute exists in Ohio, and of course the action could not be [101] *sustained in our courts. In the last-mentioned case the decision in *Campbell v. Arnold* is referred to as settling the law on the subject now under discussion. See also *Taylor v. Townsend*, 8 Mass. 411; *Starr et al. v. Jackman*, 11 Mass. 519.

It is conceded that a judgment in ejectment, against the tenant in possession, is, in an action for mesne profits, conclusive evidence of the plaintiff's title from the time of the demise laid in the declaration, and that a judgment by default against the casual ejector, with a writ of possession executed, will have the same operation. The defendant can not, in either case, put the plaintiff to proof of *actual* possession, because, in the one instance, the plaintiff's possession is sufficiently shown by the common consent rule, in which lease, entry, and ouster are confessed; and in the other, an entry under the writ of possession will be referred, by fiction of law, to the time of the demise. 2 Phil. Evidence, 211, 212.

But the judgment in ejectment is conclusive only as to the subject matter. It is conclusive of the right of possession and title only from the time of the demise; beyond that period it proves nothing. *Van Allen v. Rogers*, 1 Johns. Cas. 283; 2 Phil. Ev. 210, 211; *Aslin v. Parkin*, 2 Burr. 668.

Should the plaintiff seek to recover for a period anterior to the time of the demise, it would be competent for the defendant to controvert his title, and possession being an essential ingredient in a complete title, would have to be proven. It has been decided in Pennsylvania that the plaintiff, in an action of trespass for mesne profits, after a recovery in ejectment, shall not give evidence

Beggs v. Thompson.

of the annual value of the premises beyond the time of the demise laid on the declaration, though he be the lessor of the plaintiff in ejectment. *Shotwell v. Boehen*, 1 Dallas, 172. And Lord Mansfield was careful to remark, in the case of *Aslin v. Parkin*, 2 Burr. 668, that it appeared in evidence that the time of the defendant's occupation was *within* the time laid in the demise. The better opinion appears to be that the plaintiff, in an action for mesne profits, shall recover only from the time of the demise. But admitting *that he may go beyond that period, and [102 that by entry after a judgment in ejectment, his possession shall be referred to the time when his title accrued, and that he shall not be put to proof of actual possession; the plaintiff in this cause can derive no benefit from the concession. Had he successfully prosecuted an action of ejectment, and thereby established a legal title, he would have been entitled to all the advantages flowing from the judgment and the consequential action for mesne profits. But his entry not having been made after a judgment in ejectment, he can thereby derive no benefits that would not have resulted had that action never been invented.

The position assumed by the plaintiff's counsel, that a person having title may enter peaceably into possession without judgment or suit, is granted. We are willing to go further, and concede that he may enter in all cases without suit, when ejectment can be sustained, and even enter *forcibly* without making himself liable to a civil action. Title would be an adequate shield for his protection against any civil action that might be instituted for such entry. But it is said that, having entered without suit, his possession inures according to his title. "Adams on Ejectment," one of the authorities quoted in support of this position, is, unfortunately, not within our reach at this time; but, from our recollection of the doctrine advanced in that work, it is believed that they do not directly controvert the principles for which we contend.

But should it be ascertained that they do, we reply that they are not of sufficient authority to overturn the numerous decisions which we have quoted. The case of *Jackson v. Horiland*, 13 Johns. 235, also cited in support of the foregoing position, merely shows, that a party having title may enter without the aid of the law, but it does not establish the principle, that an entry without suit will refer his possession to the time his title accrued, so as to enable him to maintain trespass for an injury committed before he ever had

Beggs v. Thompson.

actual possession. In the last-cited case, no entry whatever was made during the term recovered in ejectment.

It is believed that there is no case in which an entry, without 103] suit, will enable a person to maintain trespass *quare *clausum fregit*, for any injury committed upon lands before he ever had a possession *in fact*, or when he was not in *actual* possession, unless, perhaps, by a disseizin for an injury committed between the time of his disseizin and re-entry.

It is said by the court, in *Tobey v. Webster*. 3 Johns. 470, that "the re-entry in such cases deduces the possession from the time of the first disseizin, and an action of trespass may be maintained," but it is expressly said by the court, in the same cause, that the possession can not be rendered effective by *relation* in any other case. The plaintiff in this cause will not pretend that he was *disseized*, as the defendant was in lawful possession until his title accrued, and as he never had a possession, in fact, until after the reception of the rents and profits to recover the value of which this suit has been instituted.

It is clear, that by *common law*, in case of intrusion, abatement, or forfeiture, the party kept out of possession can not maintain trespass against wrong-doer; and the reason assigned is, that that mode of redress is calculated merely from injuries committed on the land while *in the possession* of the owner. The statute of 6 Ann, ch. 18, sec. 5, declaring persons continuing in possession of an estate, after the determination of their interests, *trespassers*, shows that they were not viewed in that light; and could not be made liable, in that character, at common law.

TAPPAN, for the plaintiff, in reply :

A multitude of authorities are cited to prove, that to maintain this action the plaintiff must have possession. This is not disputed. The plaintiff must have *actual or constructive* possession. Here the plaintiff had *actual* possession at and before this suit was brought. He claims to recover damages for a time before the *actual*, and while he had only the *constructive* possession; and whether he can so recover, is the only question. Now, there is no authority, either of those cited by the defendant's counsel or others, which says that the plaintiff can not recover, except the cases in *Johnson*. No case in the books supports the dicta that the plaintiff in trespass can recover damages only for the time he had

Beggs v. Thompson.

actual possession. The cases cited in the *opening argument [104 prove that in trespass for mesne profits, the record of a recovery in ejectment is conclusive as to the time laid in the demise; and also, that the plaintiff may recover for time, anterior to the demise; upon other proof. This shows that the law is not as contended for by the defendant's counsel. The plaintiff here has taken peaceable possession; is he in a worse situation than he would be had he been put in possession by the sheriff? In the other case he would undoubtedly recover for the whole time, whether the demise covered it or not. The right to recover for trespass anterior is as clear; it only is to be sustained by *other evidence* than the record in ejectment. It is said that the action of trespass, for mesne profits, is something different from this action; and the difference is neither pointed out nor perceived.

In the case of *Proprietors of Kennebeck v. Call*, 1 Mass. 483, it is admitted that after *actual* entry by plaintiff, he may recover in this action for the time he has been held out of possession. The cases cited by defendant from 1 Johns. 511, and 3 Johns. 478, are fully considered, and shown to be erroneous by the court in the case of *Starr et al. v. Jackson*, 11 Mass. 519.

A disseizée may obtain trespass for injurious acts subsequent to the disseizure, and acts done while he was out of possession, after he has re-entered. 3. Black. Com. 210.

But the case now before the court has been expressly decided in the case of *Langdon v. Pother*, 3 Mass. 215, and *Gon v. Brazier*, 523.

Our statute law gives to the purchaser of lands, sold on execution, "as good and as perfect an estate," "as was vested in the party" (defendant in error). This *good* and *perfect* estate includes the right of possession and constructive seizin of the fee. Suppose the land in question to be inclosed woods (and it does not appear but what it is), and the trespass complained of, the cutting down and carrying away timber; a good and perfect estate exists in the plaintiff, at least as soon as his deed is executed, and yet trespass upon this estate is not a trespass upon his property, according to the argument of defendant. What, then, is it? The plaintiff has purchased the estate and has a deed, as good and perfect a conveyance as the defendant himself *could have given. [105 The delivery of the deed is livery of seizin, if by the party, so by the sheriff. The defendant holds possession by no claim or color

Beggs v. Thompson.

of right; he continues to trespass upon the plaintiff's property, and now says because you did not bring an ejectment against me and put me out by force, you can not recover for the injury. The distinction attempted between taking possession under and by virtue of an *habere*, and taking peaceable possession, is not founded in law or good sense, and I apprehend can not prevail.

By the Court:

It is impossible to maintain that the purchaser of land, in Ohio, at sheriff's sale, can be considered as in the actual or constructive possession, in consequence of such purchase. He obtains a right of possession only; and where adverse possession is persisted in, he must resort to legal process to invest himself with it. A summary process of forcible detainer is given to him, and when he proceeds in that manner, his possession can only commence from the time he obtains it, in virtue of the writ of restitution.

From a careful examination of all the authorities cited, we are satisfied that a plaintiff can not maintain this action of trespass without showing an actual possession in himself, at the time the trespass complained of is committed. The action for mesne profits, founded upon a recovery in ejectment, rests on grounds peculiar to itself. The doctrines that govern it have never been extended to cases where possession of lands, held adversely, has been obtained by other means.

The cases cited from Massachusetts do not apply. They are all predicated upon the particular provisions of the statutes of that state. There the growing crops are valued with the lands, and the whole together set off to the plaintiff in discharge of his claim. The officer is commanded by his writ to deliver seizin and possession to the plaintiff. Thus an actual possession commences, and a price is paid for the emblements. It is not so here. The land is valued without reference to the crop. The officer has nothing [106] to do with giving possession. The person to receive it *is uncertain until the sale is effected—and at the sale the purchaser pays for the land only. The cases are essentially distinct in all their principal features. Judgment must be given for the defendant.†

†NOTE BY THE EDITOR.—The doctrine of this case, that possession is necessary in the plaintiff to maintain trespass, will be found in the following Ohio cases: iv. 433; viii. 40; xv. 248.

THOMAS BYERS AND OTHERS v. STATE OF OHIO.

Where the proportion of the land tax due to the county has not been paid, the collector, in an action on his official bond, can not sell off county orders against the claim.

THIS was a writ of error to a judgment of the court of common pleas of Morgan county, adjourned from that county for decision here.

The case was this: Byers was appointed collector of Morgan county for the year 1824. The other defendants executed with him the official bond required by law, upon which the original suit was brought. The cause was submitted upon an agreed state of facts, which it is not material to recapitulate, as the decision turned upon a single point.

When Byers paid into the state treasury the land tax collected, he did not pay the proportion due to the county, and which, under the law, is transmitted by the auditor to the county treasurer; but he obtained a letter from the auditor of state to the county treasurer, authorizing him to receive the amount of Byers, and give a receipt for it. Byers produced this letter to the county treasurer, and at the same time tendered and offered to pay the amount due to the county, in orders issued by the county, and payable at the county treasury. These orders being depreciated, in consequence of the state of the county treasury, the treasurer refused to receive them, and brought suit on the collector's bond. The court of common pleas gave judgment for the plaintiff for the amount, and Byers obtained a writ of error.

SILLIMAN, for plaintiff in error, claimed that the county orders were an equitable offset against the suit, because the money was in fact due to the county. He cited *Wench v. Keely*, 1 Term, 619, and *Bottomley v. Brooke*, and *Rudge v. Birch*, quoted in that case. Also, 2 Cranch, 342; 1 Ben. 496; 1 Johns. Ch. 57, 63.

*GODDARD, on the other side, cited the assertion of Mr. [107
Marryat, 7 East, 148, that *Bottomley v. Brooke*, and *Rudge v.*

State of Ohio, etc. v. Trustees of Twp. 4, etc.

Birch, had been overruled. He cited the dictum of the reporter to the same effect, 16 East, 36, and the dictum of Lord Ellenborough in the latter case, that he felt much more inclined to restrain, than extend the doctrine of those cases.

By the Court:

The collector is, by law, bound to pay all the money he collects, for state tax, into the state treasury. His contract or bond is in conformity with the law, and if he does not make the payment accordingly, he becomes liable. No tender of payment at the county treasury could discharge or prevent this liability. The condition of the bond was forfeited by the failure to pay within the time prescribed by law, at the state treasury, and the right of action upon it then accrued.

The doctrine, that a debt due from the county to the defendant, may be offset against the debt due from him to the state, is altogether inadmissible. The claim of the county, for its proportion of the land tax collected, is upon the state, not upon the collector. The county can, in no form of action, subject the collector. There is no privity between them. Nor can the county be considered as, in equity, the owner of the money sued for. Although it may be admitted that the collector is indebted to the state, the state to the county, and the county to the collector, yet these debts have not been so contracted, or rather have not originated in such manner as to be subjects of offset. The case is not within the principle of any of the cases referred to. The judgment must therefore be affirmed.

**[108] *STATE, ON THE RELATION OF N. SHARP, v. TRUSTEES
OF ORIGINAL SURVEYED TOWNSHIP 4,
RANGE 3, WARREN COUNTY.**

Where the claims of a religious society for a dividend of section 29 have been erroneously rejected, and the proceeds divided among others, for the proper year, such claim can not be charged upon the proceeds of a subsequent year.

THIS cause came before the Supreme Court of Warren county upon the return of the trustees of township 4, in range 3, to a

State of Ohio, etc. v Trustees of Twp. 4, etc.

mandamus, nisi, awarded against them by the Supreme Court at their term in the year 1824, and was adjourned for decision to this court.

The society of Shakers, denominated "*United Society of Union Village*," are inhabitants of township 4, in range 3, of Warren county. In this township section 29 is set apart for ministerial purposes. The trustees of the town had refused to distribute any dividend of the proceeds to the society; and, at the May Term of the Supreme Court, in Warren county, a rule was made upon the defendants to show cause, at the next term, why a *mandamus* should not be awarded, commanding them to divide the proceeds of the section so as to allow a dividend to the society.

The defendants, in obedience to the rule, appeared at the May Term of the court, 1824, and showed cause.

Several exceptions were taken to the proceedings; and, among others, the following: that whether the applicants were or were not a religious society, entitled to a dividend of the ministerial section, was a question only triable by jury. This, and all the other causes shown, were adjudged insufficient, and a *mandamus, nisi*, awarded, requiring the trustees to receive the accounts and claims of the society for the years 1820 and 1823, and give the agent an order on the treasury for the dividend due, according to the number of members of the society, or show cause to the contrary, at the next term.

To this *mandamus*, the acting trustees made a return, that their predecessors in office, for the years 1820 and 1823, considering that the society were not entitled to any portion of the rents, had actually divided and paid out to other societies, all the moneys received for those years, so that nothing of the proceeds of those years remained in the treasury, upon which orders could be drawn. Whether this return was sufficient, was the question for decision.

*HAMMOND, for the society.

[109

DUNLAVY, for the trustees.

By the COURT:

The fourteenth section of the act of February 6, 1810, to incorporate the original surveyed township, under which the right is claimed, provides, that the "trustees shall pay to the agent of

 Lessee of White v. Sayre.

each society an equal dividend of the rent, according to their numbers, within three months after it is received."

The trustees for the time being, acting under this law, decided the claimants were not entitled, and divided the money within the time prescribed to those whom they adjudged entitled to receive it. It is, therefore, not subject to the order of the present trustees. The order required, if given upon the specific fund, would be unavailing. And we do not conceive that a general order to be paid out of any moneys in the treasury, can be given under the law. The proceeds of each year are specifically appropriated to each society, according to the number of its members for that year. There are different owners of the rents of each separate year, and if injustice be done in making one dividend, it can not be corrected, in a subsequent one, without injustice. We have no doubt but that the Union Society were entitled; a dividend ought to have been made to them, but it was not done. The fund was distributed to others, who are not before the court. Neither are those who made that distribution. The persons entitled to the funds now in the treasury, or that may come into it, are not parties to this proceeding, and a judgment affecting their rights can not properly be pronounced. The consequence of this decision may be the loss of the claimant's rights. This, it is admitted, is a hardship; but it would be equally a hardship to make them safe at the expense of others. The return is considered sufficient, and a *peremptory mandamus* can not be awarded.

 110]

*LESSEE OF WHITE v. SAYRE.

Tenant in common, or coparcenary, can convey a part of his undivided estate.

Deed by tenant in common, or coparcenary, purporting to convey in severalty, is a good conveyance for the grantor's undivided part, within its boundaries.

THIS was an ejectment, and came before the court upon a case agreed, adjourned from Greene county. The facts material to be reported, are these:

Lessee of White v. Sayre.

The defendant was in possession of a tract of land which had been the property of his former wife, by whose death it had descended in parcenary to her eight brothers and sisters; with one of the latter the defendant had again intermarried. By a judicial proceeding in the court of common pleas, partition had been made and a separate part assigned to each by metes and bounds. The lessor of the plaintiff purchased the separate right allotted to three of the heirs, and took separate deeds from each for so much land specifically described. Error was afterward brought in the Supreme Court, upon the proceedings in partition, and they were reversed.

The declaration contained several demises; among others, a separate one for one undivided eighth part of each of the tracts contained in his three deeds; and whether he could recover upon these deeds and demises, was the question submitted to the court.

ELSBERRY, for the plaintiff, cited 1 Bibb, 511; 2 Bibb, 236, 350; 3 Burr. 1897; Esp. 44; Buller N. P. 106, to prove that in ejectment the plaintiff may recover whatever he may be entitled to, although not exactly conformable to the demise laid.

ALEXANDER, for defendants, insisted, that by the reversal of the judgment in partition, the deeds made under it, and upon which the plaintiff claimed, became inoperative and void. He cited 3 Johns. 467.

Opinion of the court, by Judge HITCHCOCK:

It is well settled that where one joint tenant, or tenant in common, has ejected, or withheld the possession from his co-tenant, the person so ejected or held out of possession, may maintain [111] his ejectment against the ejector or person in possession. To determine the case under consideration, then, it is only necessary to ascertain whether the lessor of the plaintiff took anything under the three several deeds referred to in the agreed case, or, in other words, whether he had any interest in the premises in dispute. The grantors were three of the heirs of the deceased wife of John Sayre, Jr. By the death of their sister, the interest in the one hundred and fifty-five acres of land was vested in them and their brothers and sisters as coparceners, or tenants in common. It is

to be observed, that when these deeds were executed, partition had been made of the one hundred and fifty acres of land, by judgment of the court of common pleas, in pursuance of the statute in such case made and provided. The three parcels which were conveyed to White had been, by this judgment, aparted and set off to the grantors in severalty. Under the then existing circumstances, they conveyed nothing more than they had a legal right to convey. So long as this judgment remained in force, the title of the lessor of the plaintiff to the lands to him conveyed, was perfect. This judgment, however, was subsequently reversed; and it is necessary to ascertain how far the deeds, which were before operative, were affected by this reversal. That the reversal must in part, at least, defeat the operation or validity of those deeds, there can be no doubt. The judgment being reversed, the parties in interest could be no more affected by it than if no judgment had been rendered. Under these circumstances, the decision of this case must depend upon the solution of these several questions: 1. Can one of two or more joint tenants, coparceners, or tenants in common, convey his interest in the estate thus held? 2. If he can convey his interest or estate in the *whole* property thus held, can he convey it in a *part* merely? 3. Is a deed, or grant, which purports to convey an estate in severalty, when the grantor has, in fact, only an estate in joint tenancy, coparcenary, or in common, void; or does it convey the whole interest of the grantor in the premises purporting to be conveyed?

112] 1. Can one of two or more joint tenants, coparceners, *or tenants in common, convey his interest in the estate thus held?

This is a question about which it is presumed there can be no dispute. Such conveyances are frequently made, and their validity is not questioned. In fact, this is one of the most common modes resorted to for destroying a joint tenancy. One joint tenant aliens and conveys his estate to a third person, by which means the joint tenancy is severed and turned into a tenancy in common.

2. If one joint tenant, etc., can convey his interest or estate in the *whole* property thus held, can he convey it in a *part merely*?

The determination of this question is attended with considerable difficulty. This difficulty, however, arises, not so much from any apparent inconsistency, or impropriety in such grant, as from a possible inconvenience which might result to the tenant who retains his estate. One tenant in common may grant his entire in-

Lessee of White & Sayre.

terest or estate in a particular species of property, a tract of land for instance, or he may grant *one-half* as a smaller proportion of his interest in the same entire property. If this be correct, no good reason is perceived why he may not grant his entire interest in a *particular part*. A. and B. are seized of a section of land as tenants in common. It is well established, that A. may grant his entire interest, or estate, in the section, and the conveyance will be valid. Upon what principle, then, can it be said, that if he convey his entire interest in a *particular quarter* of such section, such conveyance shall be void? Certainly A. and B. tenants in common, as aforesaid, might with propriety unite and convey a *particular quarter* of the section, and a complete title in the grantee would be vested. Would not the title of the grantee be equally valid, if the tenants in common should by separate deeds convey to him their individual interest in that *particular quarter*? This question, it is believed, must be answered in the affirmative, and if so, it proves conclusively that one tenant in common may transfer to a third person his entire interest in a part of the property held in common. Otherwise we run into this absurdity, that a deed properly executed, by one individual, which is an entire thing, and *purports to convey [113 a specific property, must depend for its validity upon the execution of a similar instrument by a third person, who is in no way party to the first. The principal reason assigned why one tenant in common shall not be allowed to convey, as before stated, is, that by so doing, he may do a great injury to his co-tenant, by compelling him in case of partition, to take his proportion of the estate in small parcels, very much to his disadvantage. If such evils would result, they ought if possible to be avoided. It does not follow, however, that because one of two tenants in common can convey his estate in a *part* of the property so held, therefore the rights of his co-tenant are affected. This co-tenant will still have the same interest in every part, and in the whole of the property. He can still compel partition, and may have his share of the property set off to him in severalty, in the same manner he could have done had no conveyance been made. Such, at least, as at present advised, is the opinion of the court, and if in this we are mistaken, the objection is not of sufficient force to induce us to adopt any other principle, as applicable to this case, than as before stated.

Lessee of White v. Sayre.

3. Is a deed, or grant, which purports to convey an estate in *severalty*, when the grantor has in fact only an estate in joint tenancy, coparcenary, or in common, void; or does it convey the whole interest of the grantor in the premises purporting to be conveyed?

Every deed is to be so construed as, if possible, to give effect to the intention of the parties. It is to be construed most strongly against the grantor. If the intention of the parties, apparent upon the face of the instrument, can not be carried into effect, this object should be attained as far as is possible. Taking these principles into consideration, and adopting them as correct, it follows, that where an individual undertakes to convey to another a greater interest in the thing conveyed than what he possesses, the grantee may take that which was in his grantor. A. conveys to B. one hundred acres of land by metes and bounds. It is afterward ascertained that C. has title to fifty of the one hundred acres included within the boundaries. Will it be said that B. can take nothing by this 114] deed? On the contrary, *all the lands within the prescribed boundaries, to which A. had title, are, by the conveyance, vested in B. So far as the deed can have effect, so far it ought. The circumstance that the grantor has attempted to convey more land than he was possessed of, shall not prevent the deed from conveying that of which he was possessed. Upon the same principle, if A. and C. had been tenants in common of the same one hundred acres of land, and A. had attempted to convey the whole in *severalty* to B. so far as A. had any interest, that interest would, by the conveyance, have been vested in B. Thus far the deed would take effect. Under it B. would become tenant in common with C. in the same manner he would have done had the conveyance from A. been for an undivided moiety of the land.

These principles being applied to the case under consideration, it will be seen that the grantors of the lessor of the plaintiff, although they had not a several estate in the parcels of land by them to him conveyed, yet had an interest as coparceners, or tenants in common with others. That by the deeds of conveyance, this interest, whatever it might be, was vested in the lessor of the plaintiff; and he being kept out of possession by the defendants, the action is well brought, and the plaintiff is entitled to a judgment. Let judgment, therefore, be entered accordingly.

Judge BURNET's dissenting opinion:

As I have not been able to join in the opinion expressed by a majority of the court in this case, I will present, as concisely as possible, the view I have taken of the subject.

The defendant is in possession of a tract of land containing one hundred and fifty-six acres, which was the property of his former wife, who died intestate, without having had issue, leaving eight brothers and sisters her heirs at law. The defendant has since intermarried with a surviving sister, being one of the heirs of his former wife.

By order of the court of common pleas, the land (one hundred and fifty-six acres) was partitioned among the heirs, and one-eighth part was assigned to each by metes and bounds, after which the lessor purchased the tracts set apart to three of the heirs, and received separate deeds of conveyance therefor, by *metes [115 and bounds. Shortly after, a writ of error was brought, on which the order was reversed, and the partition set aside. Pending the writ of error the present ejectment was brought.

The declaration contained several demises, and, among others, three separate ones from the three heirs, from whom the lessor of the plaintiff had purchased. At the trial the plaintiff claimed to recover an undivided eighth part of each of the three tracts described in his deeds, and also three undivided eighth parts of the residue of the entire tract.

The former he claimed to recover on his own title as tenant in common—the latter on the title of the three heirs from whom the demises were laid, who claimed severally, as coparceners, one undivided eighth part of all the land not included within the respective deeds to the lessor.

The judges who tried the cause were of opinion that those claims could not be united and recovered in the same action, because they are distinct and unconnected. There is no privity interest, or title, between the lessor and those heirs. Their claims are to different portions of the tract, and rest on different rights, and the plaintiff can not be allowed to try several titles on one issue. Law of Ejectment, 86.

On the intimation of this opinion, it was agreed that the demises from the heirs should be stricken out, and the claim of the plaintiff be confined to the right of which he might avail himself, under his deeds, as to which, the points disputed were reserved

for consideration at the special session in the form of an agreed case.

Two questions have been discussed: 1. Whether a plaintiff in ejectment can recover an undivided part of the premises described in his deeds, having declared for the whole. 2. Whether a parcener can convey, by metes and bounds, any part of the land held in parcenary, previous to a partition.

The first point admits of no doubt. In the case of *Burgess' Lessee v. Purvis*, 1 Burr. 326, the lessor of the plaintiff claimed and declared for an undivided moiety. On the trial, it turned out that she was entitled to an undivided third. A verdict was taken sub-116] ject to the opinion *of the court. On this point, the court decided unanimously that the plaintiff must recover according to title. That she appeared entitled to a third, and that so much she ought to recover. In *Guy v. Rand*, Cro. Eliz. 13, the declaration was for one hundred acres; the plaintiff showed title to, and recovered forty acres. And it appears to be settled, that if a person declares for an entire tract, and proves title to a moiety only, he shall recover so much. 2 Roll. Abr. 734; 2 Lev. 434; 2 Bibb, 350; Bul. N. P. 109.

The second question, on which I am so unfortunate as to differ from the rest of the court, is attended with more difficulty. I do not recollect to have seen many cases in which it came up. One has been cited in the Court of Appeals of Kentucky, which will be noticed hereafter.

It is not pretended that the plaintiff is entitled to more than an undivided eighth of the land within the boundaries of his several deeds; and as he holds by purchase from a coparcener, he must claim to hold as tenant in common.

The unities of interest and title, appertaining to estates in parcenary, may be destroyed by one of the tenants, and the estate reduced to a tenancy in common; but the unity of possession, which can not be affected by the act of a single parcener, will remain. It therefore becomes a question, whether an attempt to convey in such form as would necessarily destroy that unity, is not a perfect nullity.

As neither tenant can tell, certainly, which part of the premises will be assigned to him on a partition, it would seem that neither can convey a specific portion of it. Such a conveyance would operate to destroy the unity of possession, as it would vest

in the grantee an estate in severalty ; and the effect appears to be the same, whether the deed be considered as conveying to the purchaser the entire estate in the part designated, or an undivided interest in it ; for in either case the possession is severed, and its unity broken. The possession of each tenant must be considered as extending to the whole premises, and to every part of it. But after such deeds as those now before us have taken effect, each of the grantors parts with the possession of so much of the land as lies within the limits of his deed, and retains his possession in so much as lies without those limits, and *the grantee acquires the [117 possession relinquished by the grantors, while the other parceners retain a possession extending to the whole premises. In other words, the heirs who have conveyed, retain a possession of so much of the land as lies without the boundaries given in their respective deeds, the lessor of the plaintiff acquires distinct rights of possession in each of the three tracts specifically conveyed to him, and the remaining five heirs (including the defendant, who holds in right of his wife) have possession in the whole tract, and every part of it. From this view of the case, it appears that whether the deeds to the plaintiff be viewed as conveying the entire estate within their boundaries, or an undivided eighth of it, they destroy the unity of possession that existed at the death of the ancestor.

It can not be contended that these deeds convey any interest beyond their limits, so as to extend a right of possession to the whole tract. Whatever of rights they pass, must be restricted to the limits they prescribe. There is, therefore, no escape from this difficulty. Had the deed in question-conveyed the entire interest of the grantors in the whole tract, or any proportionate part of that entire interest, this objection would not have existed. Such conveyances, while they destroyed the unities of interest and title, and changed the estate to a tenancy in common, could not have affected the unity of possession, which is inseparable from such a tenancy, and without which it can not exist. The question, therefore, recurs, is not the unity of possession destroyed by the operation that must be given to these deeds, in order to entitle the plaintiff to recover ?

It is not claimed that he can recover more than one undivided eighth in each of the three tracts conveyed, nor will it be pretended that a recovery can vest him with any right in the residue

Lessee of White v. Sayre.

of the tract. There will, then, be no community of possession between him and his grantors, as to any part of the premises; nor between him and the other tenants as to the land without the limits of the deeds; nor between the grantors and their co-heirs as to the land within those limits. The existence of these facts seems to be inconsistent with the existence of a unity of possession.

118] *I do not discover how it is possible to give any efficacy to these deeds, without deciding that parceners may exercise a greater dominion over the estate than the law has vested in them. It appears to be settled, that the unity of possession can only be dissolved in one of two ways; either by such conveyances, or transfers of right, as vest the entire interest in a single tenant, which requires the consent and co-operation of every tenant, or by partition. Neither of these expedients has been resorted to.

If a parcener can convey his undivided interest in a specified portion of the entire tract, he may locate a part of his claim on a particular spot, from which it can not afterward be removed, whereby the rights of the other tenants would be restricted, so that neither of them could, by any possibility, have that part set off to him on a subsequent partition. This must be the effect of every conveyance that vests in the grantee a right to the whole, or to an undivided part of any particular located portion of the entire estate. Such a deed, by excluding the co-tenants from the possibility of obtaining, by partition, the part conveyed, would materially abridge their rights.

If a parcener can not do an act that would destroy the unity of possession, it would seem to follow, that he can not do an act that would materially change the mode in which that unity exists. On the death of the sister, from whom the estate descended, the surviving brothers and sisters inherited, each an undivided eighth of the entire tract, and the possession of each extended throughout the whole; but if these deeds received the sanction of the court, this unity of possession, extending originally throughout the whole estate, is interrupted and broken; several unities will be created, as distinct and unconnected with each other as if the property had descended from four different ancestors. The lessor of the plaintiff will become a tenant in common with the heirs who have not joined in these deeds, in the land conveyed by the deeds; and the grantors will remain coparceners with those heirs in the premises

not so conveyed, which is a change of tenure that I am inclined to believe can not be produced by a part of the tenants, without the consent and concurrence of the whole.

*There are many cases in which a deed will operate to convey less than it purports to convey, but this takes place when the grantor has power to convey that which passes by the deed; as, if a tenant in common execute and deliver a deed for the entire estate, his undivided interest will pass, because he has power to convey that interest. The deed is sufficient to cover it; he does not change the tenure by which he holds. The whole operation of the deed is within the scope of his power, and there is nothing resulting from it inconsistent with the rights of his co-tenants, or the established rules of law. But I can not admit that cases of this description can be resorted to, to sustain a deed, which can not operate in any form without transcending the power of the grantor, and restricting the vested rights of third persons. It appears to me to be unnecessary to vest parceners with the power which has been exercised in this case. If they are permitted to convey their entire interest, or any undivided portion of it, in the form in which it exists, it is sufficient for every necessary or useful purpose. This they may do, without injury to others; but whenever they attempt, by their own acts, to effect a partition, in whole or in part, they exceed their power, and their deeds ought to be treated as nullities. There seems to be some analogy between these deeds, and alienation by particular tenants, who attempt to convey greater estates than the law allows. If tenant for life aliens by feoffment in fee, he attempts to do what is beyond his power, and inconsistent with the nature of his interest, and he thereby forfeits his own particular estate. If tenant in tail aliens in fee, although this is not a forfeiture, it is a discontinuance. In neither of these cases can the alienee take this estate, and although various reasons are given for this rule, the most satisfactory are, that it is an attempt to go beyond their power, and is inconsistent with the nature of their interest. These reasons exist, and apply with considerable force in the present case, and although it is not pretended that these grantors have incurred any forfeiture, yet the reason of the law, as stated above, may be urged as a reason why the grantee should take nothing by his deeds.

It seems to be proper, on a question like this, to look to the consequences that may follow. If two persons should purchase a

Lessee of White v. Sayre.

tract of land, as tenants in common, with a view of dividing it into two convenient farms, either of them may, under the decision of the court, lay it off into lots of ten acres, and sell his undivided moiety in all of them, to different purchasers, by which his co-tenant, instead of a convenient farm, would find himself the proprietor of a large number of disconnected five-acre lots. Such a procedure could not be resisted, nor the consequences prevented, for, if the grants be valid, and the grantees take anything, each must take the undivided interest of the grantor within the boundaries designated in his deed. The result, then, would be, that the tenant, who had taken no part in those conveyances, and might have been entirely ignorant of them, instead of taking the entire tract by moieties, according to the legal operation of his deed, and the right that vested in him at the time of his purchase, would find himself a tenant in an indefinite number of lots, with as many different individuals, and be driven to the same number of partitions to obtain his interest in severalty. By this proceeding his title would be seriously affected, and his property injuriously divided and subdivided, without his agency or consent. But the inconvenience may not stop here; the purchasers of these lots have the same right to sell portions of their interest to sub-purchasers, so that the evil seems to be without limit.

When partition is made between tenants in common, can one of them claim, as matter of right, a part of any particular portion of the premises, or can he prevent the commissioners, by whom partition is made, from assigning to his co-tenant the whole of any portion of the tract, not exceeding the quantity he is entitled to? It appears to me that he can not; because such a power would be inconsistent with the equal rights of the parties, and because his co-tenant might set up an equal claim to the same spot, and prevent a partition altogether. But on the principle contended for, this right may be claimed and secured, by executing deeds before partition.

I can not see how these inconveniences can be prevented, but by [121] assuming the ground, that as each tenant, or parcener, *has an undivided interest in the whole, and in every portion of the land, neither of them can do any act by which either might be prevented from obtaining, by partition, the whole of any portion of it, not exceeding the amount of his entire claim. This restriction goes no further than to prevent the tenants from conveying specific por-

Lessee of White v. Sayre.

tions, and thereby effecting a partition, *pro tanto*, by giving a fixed location to parts of their interest within designated boundaries.

In *Reed v. Tucker*, Cro. Eliz. 803, it is said to be clear, that every act, by one joint tenant, for the benefit of his companion shall bind, but those acts which prejudice his companion in estate shall not bind.

If these conveyances were legal, we might naturally expect to find many cases reported in which they have been recognized. But such is not the fact. The counsel has not been able to cite a single case in which such a deed has been offered, except the one in *1 Bibb*, 510. That case I have examined with some attention, and it appears to me that the point now under consideration was neither litigated by counsel, nor expressly decided by the court. Their attention seems to have been confined to the objection, that the deed purported to convey, not only the right of Johnston, the grantor, but also the right of Garrett, his co-tenant, and to the variance between the title set out in the declaration and the title proved.

The question discussed and decided was, whether a deed executed for the whole would operate to convey an undivided moiety. It seems to have been taken for granted, that for the same reason that a deed, purporting to convey the whole estate in the entire tract, would pass the undivided estate of the grantor in the entire tract, a deed, purporting to convey the whole estate in a specified portion of the tract, would pass the undivided interest of the grantor in the portion specified.

Had the point now under consideration been discussed, or had the attention of the court been directed to it, I feel inclined to believe, they would at least have hesitated, and whatever might have been their opinion, they would not have passed it over in silence. In the course of the opinion the remark, that Johnston's right in the whole was the *same that it was in any part, and that [123 he could not, without the previous consent of Garrett, create in himself, by his own act, an estate in severalty, in any part, and vest that estate in another, any more than he could convey the whole.

It appears to me to follow from this doctrine, that he could not by his own act, separate the estate, so as to create a new distinct tenancy in common, in any particular part of it, and vest that in a third person.

If the question be asked, why could not Johnston create such an

Lessee of White v. Sayre.

estate in severalty, as the court refer to, and vest it in another, the answer must be, because it would amount to an action of partition, which can not be made by a single tenant, and because it would be inconsistent with the nature of his title. But it may be asked whether it is not also an act of partition, equally inconsistent with the nature of his title, to lay off a part, by metes and bounds, and vest in a third person his undivided interest in it. As far as the act goes it operates as a partition, by fixing the limits within which a part of his right shall be located, when the final partition is made, and by giving metes and bounds within which a sub-purchaser shall take his undivided interest. In order to make it an act of partition, it is not necessary that it should assign to every tenant his full share in severalty—if it designate any specific part, within which the whole, or any portion of the right of either tenant must necessarily be taken, it is so far a partition.

As it is admitted that Johnston could not effect a partition of the land, in whole or in part, it may be asked, how he could make livery of seizin of his interest in any given portion of it. There must be certainty in the thing to be delivered, as well as power in the party by whom livery is to be made. Could Johnston, by his own act, designate to Caldwell the part of the one thousand acre tract, on which his moiety of the six hundred acres would be fixed, when partition should be made? If he could, he had power to make a partition, which is not pretended. If he could not, the thing of which livery was to be made was unascertained and uncertain, and therefore it could not be made.

Should it be objected that livery of seizin is now considered [123] *a matter of form, not necessary to be done, it may be replied, that however this may be, it is a sound principle, that an estate of inheritance can not be conveyed by a person who has not power to make livery of seizin; and it is equally certain that a tenant in common, not having power to locate any part of his claim, on any portion of the undivided premises, can not enter on any specific portion, and by his own act sever it from the residue, for the purpose of making livery of his estate in that particular portion, to the exclusion of the residue.

As far as the points were discussed and *expressly* decided in that case, I most cordially acquiesce in the opinion delivered by Judge Boyle, but with due deference I must dissent from the implied opinion, resulting from the judgment of the court, as to the par-

Wills v. Cowper and Parker.

ticular point now under consideration, which evidently passed *sub silentio*.

In the case of *French v. Lund*, Adams, 42, it was decided that an execution against one holding land as a tenant in common, could not be extended on a part of the land so holden, by metes and bounds; but on the principle adopted by this court, the extent ought to have been sustained, as to the undivided interest of the defendant in the premises, within the boundary designated by the sheriff.

In *Bartlett v. Harlow*, 12 Mass. 348, it was ruled that an execution against the land of a joint tenant, or tenant in common, could not be levied on any *particular portion* of the land, but must be levied on the debtor's share of the estate in the *whole land*. In arriving at that decision, the court established the principle, that a tenant in common can not convey by deed, by metes and bounds, his undivided interest in a part of the estate, so as to entitle the grantee to maintain a writ of partition; and they lay it down, as an incident to such estates, that one tenant is prevented from conveying distinct portions of the land.

In *Porter v. Hill*, 9 Mass. 34, it was decided, that one joint tenant can not convey any specific part of the land to a stranger, at least to the prejudice of his co-tenant.†

*JOHN S. WILLS v. COWPER AND PARKER.

[124

Power to sell lands, given by will to an executor, can not be executed by administrator with the will annexed.

THIS cause was adjourned from the Supreme Court of Brown county. It was a bill in chancery to enforce the specific perform-

†NOTE BY THE EDITOR.—That a tenant in common, etc., can convey his interest in the whole or in part of the entire tract held in common, see also vi. 398; vii. 129, 131, part 2; ix. 126. That a deed purporting to convey in severalty is good for the interest which the tenant in common has in the land described, is also recognized as settled law in Ohio, in vi. 391, and vii. 129, part 2. As to ejectment by grantee for such interest, see the same cases.

Wills v. Cowper and Parker.

ance of a contract, for the sale of a tract of land in Brown county. The following are the facts material to a correct understanding of the point decided by the court:

Josiah Parker, of Virginia, owned the land in question, and he lived and died in Isle of Wight county, in Virginia, where his last will and testament was duly proved and recorded. The will contained the following clause:

"I constitute and appoint my grandson-in-law, Joseph Baker, of the county of Nancemond, my executor to this, my last will and testament, with full power to dispose of all my lands in the States of Ohio and Kentucky, and also Randolph county, in Virginia; also, my proportion of the lots in the city of Washington, purchased of Stoddard by Luke Wheeler, John Cowper & Co.; and it is my desire that said property may be disposed of as soon as possible, and the residue of the money arising from the sale, after first paying my just debts, may be applied to the improvement of my Isle of Wight estates."

The executor thus nominated in the will refused to act, and administration, with the will annexed, was committed to Joseph B. Baker. The contract set up in the bill was made between the complainant and the administrator with the will annexed, April 11, 1815. Baker died intestate, and administration upon his estate was granted to the defendant, A. P. P. Cowper. Controversy having arose about the completion of the contract, the bill was commenced to enforce it. But the decision and opinion of the court being confined to the single point, that the power to sell, conferred by the will upon the executor, could not be executed by the administrator with the will annexed, it is deemed unnecessary to swell the report, by stating the other points in the cause.

[25] *BRUSH, for the complainant:

The power to dispose of these lands was created by the testator, in whom the right existed, and does not depend upon the statute of Virginia, or the appointment of administrator. The power, as created, vested in the office of executor, was given *ratione officii*, and belongs to the office, not the man. Co. Lit. 113, A, Hargrave and Butler's note, 146; Gwilliam v. Rown, Hardress, 204; Sugden on Powers, 162-166; Lessee of Treback v. Smith, 3 Bin. 69; Bergen v. Bennet, 1 Calne's Cases in Error, 15; 2 P. Wms. 102, 308.

Wills v. Cowper and Parker.

The title rests upon the act creating the power, and takes effect as if created by that act, which, in this case, was the will of Parker. When the power is executed, the estate and title is created by the will. *Doolittle v. Lewis*, 7 Johns. Ch. 48; 2 Atkins, 565, 568; 2 Ves. 78; 3 Johns. Ch. 550; *Powell on Powers*, 14.

There is a strong analogy between this case and that of *Doolittle v. Lewis*, in which it was held that letters of administration, granted in Vermont, were a sufficient appointment of a person to execute a power created in New York. It was the case of a mortgage by a citizen of New York, of land lying in New York, to a citizen of Vermont, containing a power authorizing the mortgagee, his executors, administrators and assigns, in default of payment, to sell and convey the mortgaged premises, according to the laws of New York. Without obtaining administration in New York, the administrator, by virtue of administration granted in Vermont, sold and conveyed the land, and it was held a good execution of the power.

The law is considered a part of every man's contract, testament, grant, or conveyance, and we must suppose he intends as the law directs. The power in question, conferred on the office of executor, by the testator, comes to the administrator by a devolution *ut cy press*. *Powell on Powers*, 380, 381, 348, 349.

The title to lands lying in this state must be regulated by the laws of this state; and so it is in this instance. For our laws allow the transmission of real estate by wills made in other states, if they are recorded here, as this will has been. The complainant takes as purchaser from Parker under *and by virtue of the [126 will, not as purchaser from the trustee, or person executing the power. The title would, therefore, conform to our laws.

A desire expressed in a will, is imperative that the thing shall be done. 2 Brown Ch. 46, 227. A power or trust of this nature, created by will, is never permitted to fail for want of a trustee. 3 Johns. Ch. 21.

On this point no argument was submitted by the other side.

Opinion of the court, by Judge SHERMAN:

The first question which arises from the pleadings and proofs in this case is, had the administrator, with the will annexed, of the estate of J. Parker, power, by virtue of said will, his appointment, and the statute of Virginia, to make the contract set forth

Wills v. Cowper and Parker.

in the bill for the sale to the complainant of the lands in controversy.

The clause in the will of J. Parker, creating the power to sell these lands, is in these words: "I constitute and appoint my grandson-in-law, Joseph Baker, of the county of Nancemond, my executor to this, my last will and testament, with full power to dispose of all my lands in the States of Ohio and Kentucky."

Joseph Baker, the executor named in the will, appeared in the proper court in Virginia, and refused to accept the trust, or qualify himself to act as executor; and thereupon, J. B. Baker, was, by the same court, duly appointed administrator with the will annexed, of the estate of the decedent, Parker.

By an act of the legislature of Virginia, passed in 1792, it is provided that where lands are devised to be sold and conveyed, and the executors named in such will shall not qualify, or die before the sale and conveyance of the lands, then, in either case, the sale and conveyance shall be made by such person to whom administration of the testator's estate, with the will annexed, shall be granted.

In April, 1815, Baker, administrator, with the will annexed, of the estate of the decedent Parker, entered into a contract to sell and convey to complainant the land now in controversy, being 127] part of the estate of the testator, Parker, *that the executor was authorized by the will to sell, and the bill seeks to have that contract executed by a conveyance of the lands.

It is a general and well-settled rule, both in law and equity, that a power given by will to the executor to sell and convey land, is to be considered as a personal trust. In contemplation of law, the power is given in consequence of the confidence which the testator had in the judgment, discretion, and integrity of the executor, and the execution of that power can not, by the executor, be delegated to any other person. 3 East, 410; 4 Johns. Ch. 368; 2 Sch. & Lef. 330. It would be absurd to suppose that the confidence which the testator had in the knowledge and integrity of his executor, and which induced him to confide to such executor the power of selling and conveying his lands, could extend to unknown persons. To render a sale, under such a power, good and valid, the executor must personally assent and act; and upon this principle it has been held that a joint authority, given to two ex-

Wills v. Cowper and Parker.

ecutors, can only be exercised by the joint act of both, and is determined by the death of one.

But it is said that the appointment of the administrator, with the will annexed, did, by force of the statute of Virginia, confer upon such administrator all the authority which the executor, named in the will, could legally exercise over the lands in Ohio. To the correctness of this proposition we can not assent. The executor derives his power from the testator, whose right it was to sell and convey or otherwise dispose of his estate, and who may, and usually does, limit the extent of the authority of his executor, and direct the time, place, and manner in which it shall be exercised. He acts as the trustee of the testator, to fulfill his intentions, and be governed by his directions, possessing no power over real estate, but such as is expressly given by the will. A person in whose favor the power has been executed, takes in the same manner as if the instrument executing the power had been contained in that given in it. *Marlborough v. Godolphin*, 2 Ves. 78. He makes his title under the power itself; and, for many purposes, the act of the trustee executing the power is in equity considered as the act of the party creating the power.

*But the very appointment, as well as the power of an [128 administrator over the estate of a decedent, emanates from the laws of the country where he receives his appointment. The extent of his authority, and the manner in which it shall be exercised, depend upon legislative enactments, and is confined to the jurisdiction of the country granting the administration. *Doe v. McFarland*, 9 Cranch, 151. An administrator, as such, can not intermeddle with the effects of his intestate in another state, unless permitted to do so by the laws of that state; otherwise it would be in the power of one state to regulate the distribution of property situated in another. And the rule is the same, whether the administration be general or with the will annexed. In either case the authority of the administrator emanates from the law, and can not extend beyond the jurisdiction of the power conferring the authority; and the will being annexed to the grant of administration, does not change the tenure by which the administrator holds his office. The right which the administrator, Baker, had to intermeddle with any part of the estate of the testator, Parker, even in Virginia, was not derived from any appointment of, or power conferred on him by the testator, but from the

Wills v. Cowper and Parker.

laws of Virginia, and an appointment of him by the proper court, in that state, as administrator, with the will annexed, of Parker's estate.

His power over the estate, real and personal, of the testator, within that state, was fixed and defined by the laws thereof, and to those laws only could he look to protect him in the due exercise of the authority they had conferred.

The owner of lands, wherever he may reside, has an unquestionable right to sell and convey them, in whichever state they may be situated, by pursuing the mode prescribed by *lex loci rei sitæ*, and he can give by deed or will this power to another. But it is not in the power of any state, by any legislative act, to prescribe the mode in which lands in another state may be disposed of, or the title thereto pass from one person to another. *United States v. Crosby*, 7 Cranch, 115.

In *Kerr v. Moon*, 9 Wheat. 565, the Supreme Court of the United States say: "It is an unquestionable principle *of general law that the title to, and the disposition of, real property, must be exclusively subject to the laws of the country where it is situated." And in *McCormick v. Sullivan*, 10 Wheat. 192, and *Darby v. Moyer*, 10 Wheat. 465, the same principle is recognized and enforced in the case of lands in one state disposed of by will made in another.

At the time when the administrator of Parker's estate contracted with complainant to sell and convey to him the lands in controversy, the laws of Ohio authorized an administrator to sell lands of the decedent only for special purposes, upon a regular application to, and an order to sell by, the court of the county where the lands were situated.

To give validity to the sale of these lands, and consider it binding on the devisee, we must necessarily recognize the right of another state to prescribe a mode in which real property in Ohio may be disposed of, different from that prescribed by her own laws.

The conferring of power upon a person to sell and convey the lands of another without his consent, is an act of sovereignty, and can only be exercised by the government of the country where the lands are situated; and at the time when the contract was made, which the complainant seeks to have executed, by a conveyance to him of the lands, there was no law of Ohio authorizing

Wills v. Cowper and Parker.

administrators, with the will annexed, whether appointed by her own courts or those of another state, to sell or convey lands directed by the will to be sold or conveyed. And it is perfectly clear that had the will of Parker been originally proven and recorded in this state, and administration thereon granted by our courts, such administrator would have had no authority to make the contracts set forth in the bill.

If Baker, as administrator, with the will annexed of Parker's estate, can legally sell or convey those lands, it is not by virtue of any power conferred on him by the testator—for he is unknown to the will—nor from any authority derived from the laws of Ohio, where the lands are situated—for those laws did not authorize such a sale—but from the laws of Virginia, where administration was granted.

The law of Virginia empowers the administrator with the will annexed, to sell and convey lands directed by the *will to [130 be sold, and when, in pursuance of this legal power, a conveyance has been made by such administrator, the purchaser holds his title under the law giving the power; and if the land is within the jurisdiction of the state authorizing such conveyance, his title would be perfect; and it would be equally so if there was no will, but the administrator was authorized by law to sell real estate. In either case the power of the administrator is derived from the law, and the purchaser would make his title under the law. The law would be the instrument creating the power, the deed of administrator the instrument executing it, and the validity of the latter would depend upon its compliance with the terms, conditions, and limitations of the former.

But if the real property sold be situated without the jurisdiction of the state authorizing it, the sale will be inoperative, and the purchaser will not acquire any interest by the administrator's deed to him. In *Nowler et al. v. Coit*, 1 Ohio, 519, this court held that a sale and conveyance of lands in this state, made under the order of a court of probate in Connecticut, was inoperative and void, and that the title remained untouched, in the heirs to whom it descended.

The case of *Doolittle v. Lewis*, 7 Johns. Ch. 48, relied on by the complainant as an authority, that a power given to sell lands may be executed by a person not named in the deed creating the power, and that courts will recognize administrators as such,

Wills v. Cowper and Parker.

although appointed in another state, is not analogous to this case. The chancellor in that case sustained a sale by an administrator, appointed by the proper court in Vermont, made in conformity to the laws of New York, of mortgaged premises situated there, under a power contained in the mortgage deed to the mortgagee, his executors, administrators, or assignees, upon failure of payment to sell—the court holding that as the administrator was named in the deed, his power to sell was derived from the deed, the act of the mortgagor, and that it was immaterial where the appointment was made, as the administrator derived no authority to sell the lands in New York, from the court or jurisdiction appointing him, but from the express appointment of the mortgagor. The principle upon which the chancellor proceeded in making his decree in that case is, that where there is, in the instrument creating the power, an express declaration that the power is not confined to an individual named, but may pass to others as his executors or administrators, the court can not reject these words in the instrument, but will consider the power as legally vested in the person who may happen to answer the description or sustain the character given in the instrument creating the power.

Whenever a power is of a kind that indicates personal confidence, it must, in equity as well as at law, be considered to be confined to the individual to whom it is given, and will not, except by express words, pass to others than the trustees originally named; though they may, by legal transmission, sustain the same character. 16 Ves. 27.

In the will of J. Parker there is no provision that in case of the death or refusal to act of the executor, the power given him to sell the lands in Ohio should pass to others. None are nominated, either by name or character, upon whom the power conferred on the executor, was, upon any contingency, to devolve. And the will furnishes indications, other than the nature of the power, that the testator reposed a personal confidence in his executor.

Where the will confers a mere power of selling, or otherwise disposing of property, or of selecting the individual who is to enjoy the testator's bounty, and the power is not executed by the person nominated, a court of chancery can not execute it; but where a trust is created and power given to the trustee, which it is his duty to execute, he is considered as a trustee of the

Wills v. Cowper and Parker.

power, and not as having a discretion to exercise it or not; and neither the negligence nor death of the trustee, or other circumstances, will be permitted by this court to defeat the interests of those for whose benefit it was his duty to execute it. *Brown v. Higgs*, 8 Ves. 561. But the court will execute such a power upon the application of those only who have an interest in the trust fund given by the will enacting the trust. It is for the purpose of effecting the intent of the testator, which would otherwise be defeated, and to secure the interests of those who are strictly *cestuy que trusts*, that a *court of equity will execute a [132 power coupled with a duty to execute, when the party, to whom that power was given, has failed to discharge the duty imposed on him. It does not so alter the nature of the power as to make it transmissible by the trustee, or by operation of law.

The testator, Parker, gave his executor power to sell his lands in Ohio, who declined accepting the trust, or executing the power. If the power had been coupled with a trust, and it was necessary that the power to sell should be executed to effectuate the intention of the testator in favor of *cestuy que trusts* upon a proper application by them to a court of chancery, such sale would be directed on the ground that the power to sell was coupled with a trust which can never fail for want of a trustee. If such *cestuy que trusts* had applied to a court of chancery in Virginia, who had ordered a sale of testator's lands, it could not be pretended that the purchaser at such sale would thereby acquire a title to the lands in Ohio. The decree of the chancellor in Virginia might have ascertained and determined the rights of the parties, but could not divest the title of the heir or devisee to lands in Ohio.

In this case, no *cestuy que trusts* are seeking the execution of the power to sell, as the only means to secure any benefit intended them by the will, but a purchaser from the administrator with the will annexed, who claims that, by virtue of the statute of Virginia, the power to sell, given by the will to the executor, was legally transmitted to the administrator, and a contract having been made by such administrator to convey the lands in controversy to him, he is entitled to the aid of this court in procuring a legal title.

While we recognize an administrator appointed in another state, as we are bound by statute to do, his appointment being legally authenticated, we can not look to the laws of the foreign state appointing him, to ascertain the extent of his authority over prop-

Wills v. Cowper and Parker.

erty within this state; that is, and must be, subject only to our own laws. Over the lands of the testator in Ohio, Virginia had no jurisdiction. She could prescribe no rule for the descent or disposition of them, nor could her legislature or courts confer any [133] power *upon an individual to sell, convey, incumber, or in any manner affect the rights of the devisee or heir. .

The court being of opinion that J. B. Baker had no power to sell or convey the lands of the testator, Parker, in Ohio, by virtue of his appointment as administrator with the will annexed, the statute of Virginia, and the power given in the will to the executor to sell, it follows that the complainant acquired no interest, legal or equitable, in the lands in controversy, under the contract set forth in the bill.

This being the opinion of a majority of the court, and it going to the foundation of the complainant's claim for a specific execution of the contract against the devisee, it is unnecessary to consider the various other questions made in the cause. Bill dismissed.

Judge BURNET's dissenting opinion:

From the most careful examination which I have been able to give to this case, my mind is brought to the conclusion, that the complainant is entitled to a decree.

As I am so unfortunate, in this opinion, as to differ from the rest of the court, it becomes my duty to state the grounds on which it is formed; and in doing this, it will be necessary to consider, not only the point on which the case has been decided, but also the other points taken by the defendants, or at least such of them as would, if decided in their favor, preclude the complainant from a decree. The defense may be considered as resting on three grounds:

1. The alleged insufficiency of the statute of Virginia to vest in the administrator a power to make the contract. First, because the statute is not to be regarded in this state, and secondly, because the will is not within the provisions of the statute.

2. The inadequacy of the price to be paid by the complainant.

3. That the complainant has been guilty of laches in not paying the purchase money at the time it became due.

On the first point it is contended, that the courts of this state will not regard the laws of Virginia, so far as to consider the con-

tract of sale, made by the administrator with *the will [134 annexed, as a legal execution of the power granted to the executor.

On this point, it may be remarked that the laws of Ohio do not require contracts for the sale of land to be made within the state, nor do they prescribe any form in which they shall be drawn, provided they are in writing, signed by the party, or by some person lawfully authorized.

Contracts may be made in person, or by an agent, and we have no established exclusive form of creating an agency. It is not necessary that it should be created or executed within the state. The agent may reside in another state; he may receive his power there, and there he may execute it. We have nothing to control the discretion, or restrain the will of a person of full age and sound mind, in the disposition of his land. Neither the interest of the state, nor the safety of individuals, requires that we should.

A contract to sell is only an expression of the will of the owner, in the exercise of legal right, and if that will be expressed on a sufficient consideration, it must be respected, without regard to form. Acts done in another state, in conformity with its laws, so as to be valid and binding there, are to be considered as valid and binding here, if they do not contravene our own laws. The laws of every well-regulated state prescribe some mode of conveying real property; and, when a contract is made for that purpose, the execution of it must conform to the law of the state where the property lies. A foreign power can not prescribe a rule of property, or dictate a mode of transferring it.

To effect a valid transfer of title, there must be the consent of the owner, in the form of a contract, and also the legal execution of a conveyance. There is, however, no necessary connection between the act of contracting, which expresses the consent, and the act of carrying the contract into execution, which passes the title. They may, and frequently do, depend on different laws. The former is generally left to the direction of the common law; the latter is most usually regulated by statute. The former has but little influence on the policy of a state; the latter is of great importance, and is one of the most interesting attributes of state sovereignty. Hence it is, that prior to the statute for *the [135 prevention of frauds and perjuries, the owner of land in Ohio might have bound himself to sell it by a verbal promise, made in any part of the world, and the courts of this state, having ascer-

tained the existence and consideration of the promise, by the ordinary rules of proof, would have enforced it; but the mode of transferring title was considered of such importance, that it formed a part of the ordinance for the government of the territory, and has ever since been regulated by statute. An attempt to divest a man of his property, without his consent, unless by the operation of a law which has constitutionally emanated from the supreme power of the state, would be oppressive, and could not be sustained in our tribunals; but when consent has been obtained, there remains no legal objection to the conveyance of the title, in the form prescribed by statute.

This distinction between the manner of making the executory contracts, and of executing them specifically, has been overlooked in argument. Counsel have attributed to the engagement, or promise to sell, the solemnity required by statute, in the transfer of title. The law relating to the execution of deeds has been applied to the execution of contracts for deeds. I am aware that every solemnity required by law, either in a contract for the sale of land, or in the deed by which it is to be conveyed, must be observed; but it is no objection to a contract, that the law does not direct or expressly recognize its form, provided it does not prohibit it, or prescribe a different form. If the contract be good on common law principles, and is not repugnant to the statute of the state, it must be obligatory; or if it be good under the statutes of the state where it was made, and not repugnant to the laws of the state where it is to take effect, it must be regarded as obligatory.

It has been observed before, that our laws neither prescribe nor prohibit any form of contract. If it be in writing and signed, it is sufficient. On all other points the contracting parties are left to their own discretion. The owner of the land in Ohio may contract to sell it at home or abroad, in person or by agent, and he may constitute an agent in conformity with the laws of the country where he may reside or happen to be, as there is not anything in the laws of the state to prohibit it. It becomes, then, a mere
[136] *matter of fact, whether Parker has authorized this contract agreeably to the laws of Virginia, and whether Baker has made it in pursuance of the authority given him. As the local laws of Ohio are silent on the point they have nothing to do with it.

Executory contracts, for the sale of real and of personal estate are

Wills v. Cowper and Parker.

put, by the common law, as to the solemnity required, very much on the same ground. The distinction which now exists has been produced by statute. The only difference made by the laws of Ohio is that the former must be in writing. That peculiarity having been observed in the case before us, the contract stands, in other respects, on the ground of the common law. There is nothing in it, or in the mode of its execution, that is opposed to our law, nor is there anything not contained in it that is required by our law. As to its object, its form, and its mode of execution, it is in strict conformity with the law of Ohio; consequently, if Baker was vested with such a power as would have authorized him to sell the land had it been situated in Virginia, he must have been authorized, by the same power, to sell it without reference to its situation. In conformity with this principle, this court, on a bill relating to land similarly situated in this state, received a record of a decree rendered in the state of Virginia on a claim originating under the laws of that state, and held the decree to be binding on the parties; and as it appeared from the record, that an appearance had been effected for the defendants, they refused to look into the merits of the claim.

As the question presented in this part of the case relates only to the validity of an executory contract, it does not involve a rule of property. It is not a question of title, but of testimony, depending on general principles and not on the peculiar laws of Ohio. The first inquiry in relation to it is, does the testimony offered satisfy the mind that Baker had a power legally derived from Parker to make this contract? If he had it is our duty to enforce it. Its obligation and its construction depend on the laws of Virginia, where it was made; the mode of enforcing, or of carrying it into execution, depends on the laws of Ohio, where the land lies.

*Parker derived his title under the laws of Virginia, [137 prior to the act of cession, when she had the right both of jurisdiction and of soil. The will was made in Virginia—the power was to be exercised there. The consideration money received was to be disbursed there, and the trustee was to account for the execution of his trust before the tribunals of that state and according to their laws. The validity of the will containing the power depended on those laws; and it would seem to follow, that the construction and legal effect of it should be determined by them also. If a citizen of another state can delegate a power to sell his lands

in Ohio, by a will executed agreeably to the laws of his own state, why may not the will be construed, and the rights and powers it confers be determined and executed, in all respects, agreeably to those laws. The testator had them in view when he made his will; he relied on them for its construction, and he must have given the power in reference to the manner in which they authorized and required its execution. It is, then, the same as if he had recited the statute, or had given to the administrator, with the will annexed, in express words, the contingent power which the statute had given him. Parker was willing to vest this power in his executor, with a knowledge that if he did not prove the will the court would appoint an administrator, on whom the power would devolve. He therefore virtually gave the power, and authorized its execution by the administrator. As he appears to have been anxious that a sale of the land should be effected, it is presumable that he would have made an express provision for the contingency that happened if he had not relied on the remedy provided in the statute.

If a foreign legislature should pass a law affecting the title to lands in this state, or changing the mode of conveying them, it would be considered as a nullity; but the law in question has no operation on the land or on the mode of conveying it. It merely authorizes the proprietor to dispose of it, or to vest a power in some other person to sell it, in such manner and for such purposes as he may direct. It is the practice of every day, in appointing agents, to authorize them to make subagents, with all the powers *they possess themselves; and this is, substantially, the amount of what is here complained of. In order that the will of the testator may not fail, and that the expense and delay of an application to chancery may be prevented, the act provides that the powers of the executor, special as well as general, may be performed, in certain cases, by an administrator; but no executor is required to submit to this provision. He may avoid it, either by nominating a trustee, to act in case the executor does not, or by an express limitation of the trust to the executor, to the exclusion of all other persons; and, when this is not done, it is an unequivocal adoption of the substitution provided by the statute. When Parker made his will he knew the law, he understood its operation, and intended to adopt the transfer of power which it provided. He virtually authorized the court to provide for the execution of the trust on failure of the executor to execute it. It

Wills v. Cowper and Parker.

would seem that the power of the administrator was legally derived from Parker himself.

Such was the doctrine laid down in the case of *Melan v. Fitzjames*, 1 Bos. & Pul. 133. The contract in that case had been made in France. Rook, Justice, said, "this contract is considered in France as not affecting the person. Then what does it amount to? It is a contract that the duke's estate shall be liable to answer the demand, but not his person. If the law of France has said the person shall not be liable on such a contract, it is the same as if the law of France had been expressly inserted in the contract."

Chief Justice Eyre declared, that, "*if it be a personal obligation there, it must be enforced here in the mode pointed out by the law of this country; but what the nature of the obligation is, must be determined by the law of the country where it was entered into, and then this country will apply its own law to enforce it;*" or, in other words, that the obligation of the contract depends on the *lex loci*, the mode of enforcing it on the *lex fori*. In *Talleyrand v. Boulanger*, 3 Ves. Jr. 447, the chancellor said it would be contrary to all the principles which guide the courts of our country, in deciding upon the contracts made in another, to give a greater effect to the contract than it would have by the laws of the country where it took place;" and, by a parity of reasoning, it would be equally inconsistent with those principles to give it a less effect. Huberus, vol. 2, b. 1, t. 3, in treating of the *lex loci contractus*, says, "that by the courtesy of nations, whatever laws are carried into execution within the limits of any government are considered as having the same effect everywhere, so far as they do not occasion a prejudice to the rights of other governments or their citizens." If this courtesy be observed by nations, independent and unconnected, it ought to be adopted by states united under one government, the constitution of which requires full faith and credit to be given, in each state, to the public acts, records, and judicial proceedings of every other state. That no prejudice can result to the State of Ohio, or to her citizens, from an acknowledgment of the contract in question, is very apparent from the fact that our own legislatures have introduced the same provision into their code, and have given to administrators, with the will annexed, the same power that was exercised by Baker under the statute of Virginia. This is an unequivocal expression of their

Wills v. Cowper and Parker.

opinion that a power given to an executor to sell, may be transferred by law to an administrator, without prejudice to the public or to individuals; and, as the provision extends to foreign as well as domestic wills, it expressed the further opinion, that such a power, created and exercised in other states, according to their laws, may be safely recognized as valid and operative in ours.

I have no objection to the proposition laid down in this case by the majority of the court, that the executor derives his power from the testator; that he acts as a trustee, and possesses no power over real estate but such as is given by the will; that an administrator derives all his power from the law of the country where he receives his appointment, and that he has no power to act in any other jurisdiction unless it be conferred on him by the laws of that jurisdiction; but I differ from them in the application of those principles. Their effect seems to be that Baker could not sell the land in question without the power given by the will; that the administrator, having received his power from the law of Virginia, can not exercise it in the State of Ohio further than he is permitted by the law of Ohio.

[40] *It appears to me that as the will gave the power to the executor, and as the law under which the will was made, and by which the testator intended it should be construed and executed, transferred that power to the administrator, it is the same in effect as if the testator had given the power to the administrator by name, and the administrator must be considered as having made the contract by the authority of that special power, and not in virtue of the general power derived from his appointment.

The majority of the court admit that a contract made by Baker, in conformity with the power in the will, would have been good, and might have been enforced in the tribunals of this state. It must also be admitted that if the land in question had been within the jurisdiction of the State of Virginia, the contract by the administrator would have been good. The question then is, whether a contract for the sale of land in Ohio, made in the State of Virginia, by virtue of a power derived from the proprietor agreeably to the law of Virginia, will be recognized in this state. This question, it appears to me, may be decided by adverting to the difference between a contract to sell and a deed by which the title is to pass. The former may be made according to the laws of the state where the power is given and the agent resides; but the latter

must be done agreeably to the laws of the state where the land lies. Keeping this distinction in view, it will be difficult to assign a satisfactory reason why it is that a will which vests the administrator with power to contract for the sale of land in Virginia may not also vest him with power to contract for the sale of land lying in another state. A written contract made by Parker, in Virginia, agreeably to the forms recognized in that state for the sale of these lands, would have been good, though he could not have conveyed the title in any other form than that prescribed by the laws of Ohio; and why may not the administrator, vested with the power of Parker, agreeably to the laws of Virginia, do the same thing?

Although the power of an administrator must be exercised within the jurisdiction which gave it, yet his acts, legally done within that jurisdiction, are to be regarded as valid in every part of the world. If he collects a debt and *gives a release, or [14] does any other act authorized by law, or by the will annexed to his letters, it ought to be valid in any jurisdiction, as being within the scope of his power. But the ground taken by the court would seem not only to prevent a foreign administrator from acting within our jurisdiction, but to deny the validity of his acts, properly done within his own jurisdiction; for in this case he did not attempt to exercise power within our jurisdiction. He acted under the laws and within the jurisdiction of his own state, where his acts were legal and valid, and where the contract was lawful and obligatory. The application to this court is against the administrator, to obtain the benefit of that contract in the mode prescribed by our own laws.

As Baker's power was derived entirely from the laws of Virginia, why do we recognize the validity of any of his acts? I can give only one reason—because they were authorized by the laws of that state, and not forbidden by ours.

Parker could have contracted away these lands in Virginia; he could have conveyed them by deed, or he could have created an agent with power to do the same thing, and the only question would have been, was the power created according to the laws of that state, and was the deed conveying the title made in conformity with the laws of our state? On this ground I can not reject the contract of Baker, as having been made without authority. I con-

Wills v. Cowper and Parker.

sider him in *loco testatoris*, and, as to these lands, vested with power to do whatever his principal might have lawfully done:

I agree with the court, that the annexing of the will to the letters of administration can not change the tenure by which the administrator holds his office; but I contend that it may materially affect his powers and duties, as he is bound to take the will for his guide. I also admit that an administrator, by virtue of his general power, can not dispose of real estate, but I contend that Baker, in this case, did not act under his general power, but under a special power derived from Parker, in strict conformity to the laws of Virginia.

I dissent from the proposition laid down by the court, that a [142] confirmation of this contract would recognize the *right of another state to interfere in the disposition of our lands, or to prescribe a mode in which it should be done. There is a great difference between a statute that authorizes a sale of land and prescribes the mode of executing deeds, and one that directs the manner in which the proprietor of land may constitute an agent, with power to sell, leaving the conveyance, and if required the form of the contract of sale, to be directed and controlled by the laws of the state where the land lies. The former of these, to which the objection of the court applies, has not been attempted in this case.

I can not admit that a recognition of the validity of the statute in question interferes with the sovereignty of this state. That statute merely designates the person who shall execute a power given in conformity with its own provisions, and that may be executed within that state, leaving the form, and everything else connected with the execution of it, to the laws of the sovereignty within whose limits it is to operate. I take it to be true, as a general proposition, that an executory contract, made in any state, under a power delegated according to the laws of that state, will be regarded as binding in any other state, and yet the sovereignty of the state where it operates is not considered as impaired.

The court have placed the case altogether on the ground that the power to sell was conferred exclusively by the statute of Virginia, which seems to me to be a *petitio principii*. I consider that power is derived from the testator, by his own voluntary act. The statute provided a mode in which a power might be created, to be executed precisely as this has been. The testator availed

Wills v. Cowper and Parker.

himself of that mode, knowing, and consequently intending that it might be so executed. The power to convey is full and sufficient; it emanates from the testator, and the only question is, by whom it may be executed.

But independent of every consideration, it appears to me that the right of the complainant is sustained by the statutes of this state. Our statute book has always contained a provision for putting wills, executed and proved out of the state, upon a footing with wills executed and proved *within it, as will appear by [143 referring to the territorial law of 1795; section 2 of the state law of 1805; sections 12 and 13 of the act of 1818; sections 12 and 13 of the act of 1810; sections 12, 13, and 16 of the act of 1816, and sections 12, 13, 14, and 15 of the act of 1824. Under these provisions the will of Parker has been offered for probate, and recorded in the county of Brown, in which the lands lie. Section 12 of 1816 is in these words: "Authenticated copies of wills and codicils, proved according to the laws of any state or territory of the United States, relative to any estate within this state, may be offered for probate in the court aforesaid in the county where such estate shall lie. The court aforesaid may admit to record any such authenticated copies, and such copies, so admitted to record, shall be good and valid in law, in like manner as wills made in this state are declared to be." Section 15 entitles the executors to probate on such copies, and authorizes the court to grant administration with the will annexed. Section 16 is in these words: "That the sale and conveyance of lands devised to be sold shall be made by the executors, or such of them as shall undertake the execution of the will, if no other person be appointed for that purpose, or if the person so appointed shall refuse to perform the trust, or die before he shall have accomplished it; but if none of the executors named in such will shall qualify, or, after they have qualified, shall die before the sale and conveyance of such land, then, in those cases, the sale and conveyance thereof shall be made by such person or persons to whom administration with the will annexed shall be granted." This provision is general; it extends to all wills recorded after the statute took effect, without reference to the state or country in which they were executed, and without reference to the time of their execution, whether before or after the passing of the act. Wills that had been previously recorded, on which letters testamentary had issued, and estates on which letters of adminis-

Wills v. Cowper and Parker.

tration had been granted, are not within the operation of the act; but all wills that had not been presented, proved, and recorded, and all cases requiring administration, in which letters had not 144] been granted at *the time the law took effect, are within its provision. The distinction seems to be this, that estates which are in progress of settlement before our courts under the former law, should not be interrupted, but proceed as though the law of 1816 had not passed.

Wills, executed, but not recorded before the passing of this act, may be proved and recorded, and the estates may be settled agreeably to its provisions, because the former law can operate only on wills which had been proved, and on which letters had been granted before the present law took effect. The will of Parker was proved and recorded in the proper court, in the county of Brown, after this law had taken effect, and before any proceedings were had on it in the State of Ohio.

If it had been the intention of the legislature to restrict the operation of the act, by reference to the time when wills were made, or took effect, they would not have provided for the sale and conveyance of all lands *devised* to be sold, using the past participle, but would have selected terms confining it to the future. This language appears better calculated to embrace wills that have taken effect without reference to the time when, than to such as might afterward take effect. The same inference may be drawn from the language of the repealing clause, which excludes only a certain description of wills, from which we are to understand that all others were to be embraced.

The exclusion is limited to wills on which letters had been granted before the taking effect of the act. The question may here be asked, granted where? I would answer, in the courts of Ohio; because, as to foreign wills, the statute can operate on such only as have been proved and recorded in the state or country where they were made. When this has been done, they are put on a footing with wills made in the state, and like them, are ready to be offered for probate. It would be a strange construction of the law, to exclude a will from its operation, because that has been done which the law itself requires should be done, before it can be brought within its operation.

The obvious interpretation of the act is, that wills made in this 145] state, or made, proved, and recorded in any other *state, on

Wills v. Cowper and Parker.

which letters shall not have been granted in the courts of Ohio, before the taking effect of the act, shall be proceeded on agreeably to its provisions.

Section 12 gives the same effect, to wills made and proved out of the state, as it does to those that are made within it, and as a power to sell land in a will made within the state, before the taking effect of the act, but recorded after it, is transferred to the administrator with the will annexed, the same transfer of power must take place as to wills which have been made and recorded out of the state before the act took effect, on being recorded within it after it took effect, and particularly so as to wills made and proved in states where the power has been transferred by statutes similar to our own.

I take it to be a self-evident proposition, that all wills made in this state, without reference to the time when, are to be governed by the provisions of the act of 1816, provided they are proved and recorded in the proper court, after that act took effect; and that authenticated copies of wills, made and proved in any other state, without reference to the time when, are to be governed by the provisions of the same act, provided they are presented and recorded in the proper court of this state, after the act took effect. From this proposition it seems to follow, that if a will, made in this state twenty years ago, containing a power to sell land, be presented and proved after the law of 1816 took effect, the administrator with the will annexed may execute the power, because the statute attaches with reference to the time when the will is presented and recorded, and not to the time of its execution; and, for the same reason, if a will made and proved in another state, twenty years ago, containing a similar power, be presented and recorded in this state after that act took effect, it will be governed by its provisions, and the administrator with the will annexed will be vested with same power.

In support of the second branch of this objection, the case of *Wooldridge's heirs v. Watkins*, 3 Bibb, has been cited. I have examined that case carefully, without being able to discover much similarity between it and the case under consideration. The wills of Parker and of Wooldridge are *very different. Parker [146 designated specific parts of the lands, and ordered them to be sold, absolutely, and as soon as possible; he directed how the proceeds should be applied, and appointed but one executor, who refused to perform the trust. Wooldridge did not direct any land to be sold,

Wills v. Cowper and Parker.

but "left it in the power of his executors to sell, or exchange any part of his estate, real or personal, as they might judge necessary, for the advantage of his estate," and appointed four executors, one of whom only qualified and sold the land. The court decided that the case did not come within the statute, because the sale was not directed to be made unconditionally; that it stood as at common law, and that, as the power was not coupled with an interest, it must be executed by all the executors to whom it was delegated.

An attempt has been made to assimilate the cases, by reference to that clause in Parker's will, which requires his estate to be kept entire, except such parts as his executor, with the advice of his daughter, might think it to the interest of his estate to have disposed of. This clause must relate to those portions of the estate that are not devised to be sold, as will be evident by comparing the different parts of the will.

In the first section, the testator bequeaths to his daughter sundry portions of his personal estate, and the use of a part of his real estate in the State of Virginia, and then subjoins the following clause: "In the meantime my estate is to be kept entire, except such portions as my executor, with the advice of my daughter, may think it to the interest of the estate to have disposed of." By the second section, he devises all the rest of his estate, both real and personal, to his grandson. By the third section he constitutes his grandson-in-law his executor, with full power to dispose of all his lands in the State of Ohio—in Kentucky—in Randolph county, Virginia, and also his proportion of the lots in the city of Washington, and declares it to be his desire, that the said property may be disposed of as soon as possible. In the succeeding clause, he declares it to be his will and desire, that all, or any part of his houses and lots in the towns of Norfolk, Portsmouth, and Quasport, be sold, provided his daughter and Thomas Pearce, of Smithfield, shall think it proper, and for the benefit of his estate.

147] *These provisions are distinct, and independent of each other, relating to different parts of his property. The injunction in the first clause, whatever property it may refer to, can not be construed so as to revoke the unqualified power contained in the third clause, which is accompanied with a direction, that it be executed as soon as possible; and it is equally certain, that the fourth clause, which gives a qualified power to sell the property therein described, can not affect it. The rule for construing wills is more liberal than that

Wills v. Cowper and Parker.

which applies to deeds. As to the former, it is the object of courts to give effect to the intent of the testator, which they ascertain from his words, giving to them such a construction as will permit every part to stand. Formal and technical words are dispensed with when the intent can be clearly collected. 1 Fonb. 442. In *Osgood v. Franklin*, Chancellor Kent says, the intention of the testator is much regarded in the construction of powers to sell, and they are construed with greater or less latitude, in reference to that intent. 2 Johns. Ch. 22.

The same doctrine is laid down in 3 Term, 665; 4 Term, 741, n.

From an examination of the whole of Parker's will, there can not be a doubt but that he intended to vest in his executor an absolute, unqualified power to sell the Ohio land.

The three provisions that have been noticed, are different in their qualifications, and must refer to different portions of the estate. The property to which the first clause relates, is to be disposed of, with the consent of the daughter. That described in the third clause, is to be sold by the executor immediately, without the advice or consent of any other person; while the houses and lots in the fourth clause are to be sold, provided the daughter and Thomas Pearce should think it for the benefit of the estate. If the condition in the first clause may be extended to the third, that in the fourth may be extended both to the first and third, so that the consent of the daughter and Pearce would be necessary to authorize a sale of any portion of the estate, which would be contrary to the intention of the testator. The plain construction of the will is, that so much *of the estate, as is not embraced [148 in the third and fourth sections, shall be kept entire, unless the daughter consent to have it disposed of; that the land mentioned in the third section shall be sold by the executor, as soon as possible; and that the houses and lots in the fourth clause may be sold, provided the daughter and Thomas Pearce think it advisable. The intention of the testator, then, admits of no doubt. He has enjoined it on his executor to sell the Ohio lands as soon as possible; but if this power can not be executed without the consent of the daughter; if the trustee can not do what the will positively enjoins, without her approbation, the power is subject to a condition that may defeat it. The rule laid down by Lord Holt, in *Winters v. Loveday*, Carth. 429, is, that where a qualification is annexed to a power, which, if observed, goes to destroy it, the law

Wills v. Cowper and Parker.

will dispense with such qualification. If the will, then, be susceptible of the construction contended for by the defendants, it ought to be rejected, for the purpose of preserving the power, and of giving effect to the intention of the testator.

2. The second ground to be considered is the alleged inadequacy of price. On this point the authorities do not seem to furnish any settled rule. In the case of *White v. Damon*, 7 Ves. 30, in which the lord chancellor refused to decree a specific execution, the price was less than half the actual value of the premises. The title was undisputed, and there were circumstances of unfairness in the time and place of sale.

In the case of *Coles v. Trecothick*, 9 Ves. 246, Lord Eldon declared, that unless the inadequacy of price was such as to shock the conscience, and amount in itself to conclusive and decisive evidence of fraud in the transaction, it was not itself a sufficient ground for refusing a specific performance.

In *Burrows v. Lock*, the master of the rolls declared his doubts, whether he could refuse to act on a contract, merely on the ground of inadequacy of price, where fraud was out of the case. 10 Ves. 474.

In 13 Ves. 103, it is declared, inadequacy of consideration, though not of itself sufficient to set aside a contract, is, when gross, strong evidence of fraud.

149] *In the case of *Floyer v. Sherard*, Amb. 18, which was an appeal from a decree made at the rolls, the chancellor refused to set it aside, on the ground of inadequacy, because there was no evidence of any particular imposition by the plaintiff.

In the case of *Eastland v. Vanarsdel*, cited from 3 Bibb, there was not only inadequacy of price, but strong circumstances of fraud. The complainant, who was the purchaser, had the reputation of a sharper; he drew the contract, and omitted a very important part of the consideration. The facts were such, as induced the court to declare the bargain unreasonable, hard, and unconscientious.

The doctrine laid down in 2 Powell, 78, is, that inadequacy of price alone, when all parties are informed respecting that about which they are contracting, is not a sufficient ground for a court of equity to refuse to give its sanction to a contract, unless the consideration be inadequate in a degree that will warrant the

Wills v. Cowper and Parker.

court to conclude fraud from the internal evidence the transaction itself furnishes.

The inference to be drawn from the authorities seems to be, that inadequacy of price will not justify a court in rejecting a contract, or refusing to execute it, unless fraud be actually proved, or irresistibly inferred from the facts of the case. In the absence of such proof, fraud can not be established by inference, especially in a contract for the sale of an estate, the value of which depends on a contingency, of which the purchaser is to stand the risk. When the title, or the value of the thing contracted for, is understood to be uncertain, or contingent, the validity of the contract is never affected by the result, otherwise such property could not be the subject of a certain contract. Men may make risking bargains, in which the price stipulated is influenced by the degree of risk to be run; and when a purchaser takes the risk on himself, it is not expected that he will pay the intrinsic value of the property. An abatement is made in proportion to the risk, which is estimated by the parties themselves, and can not be regulated by the conscience of the chancellor. The objection of inadequacy is therefore properly confined to cases where the purchaser stipulates for a sound title, and for a recourse if it *prove defective. In [150 such a case an estimate may be made, and the difference between the value and the price may be ascertained; but, in the case before us, this is wholly impracticable. Wills contracted for nothing more than the right of Parker; if that failed he was to lose the purchase money. He took upon himself a risk, the consequences of which can not be estimated by this court. It is known, however, that the uncertainty of title, in the Virginia military district, is proverbial, and that in many cases it is impossible to ascertain the existence of conflicting claims, till they are set up by the claimants. The parties themselves were the best judges of these circumstances, and have contracted accordingly. There is no evidence of fraud, nor can it be inferred, because it is wholly uncertain whether the price stipulated be more or less than the value of the right to be received. In the case of *Osgood v. Franklin*, Chancellor Kent lays great stress on the defects and difficulties of title. He observes that lands, in such a situation, have no determinate value, and are not to be estimated by the price of improved farms, or lots which have a clear title; and, although the estimated value of the property in that case was two hundred thousand dol-

ars, and the price paid but twenty-five thousand dollars, he sustained the contract.

3. The third objection is, that complainant has been guilty of laches, in not paying the purchase money, at the time agreed on in the contract. To estimate correctly the force of this objection, it will be necessary to advert to the facts. The contract was made in April, 1815. The purchase money was to have been paid in June following, when the deed was to be executed, with a special warranty only. Before the day of payment, complainant discovered that a bill had been filed, in the county of Brown, by Gilliland and others, in which they set up a title to the same land, under a contract with Parker, in his life. Pending that bill, Baker, the administrator, died. In April, 1817, the defendant, A. P. P. Cowper, was appointed administratrix, with the will annexed. Between the death of Baker, and the appointment of Mrs. Cowper, there was no person authorized to receive the money, or make a deed; but Wills, anticipating the appointment of Mrs. Cowper, 151] applied to *her to know whether she would receive the money and perform the contract, which she refused to do. The present bill was filed in 1818. On May 2, 1815, complainant wrote, stating that he did not expect to be able to pay the purchase money on the day stipulated, and requested further time. On June 29th following, he wrote, expressing doubts as to the power of the administrator to convey, and proposing a new contract. A part of the land has not yet been carried into grant, and a part has been patented to Josiah Cowper, the devisee.

It was urged that the payment of the money was a condition precedent, and that, inasmuch as Wills did not perform that condition, he is without remedy at law; and that, therefore, equity will not relieve, as it would be a violation of the rule, that when damages can not be recovered at law, on a contract, equity will not decree a specific performance. This rule is not general in its application; it does not relate to defective contracts, nor is it generally applied to the negligence, or omission of the parties, for in both of these cases equity does and will relieve; but it applies particularly to contingent contracts, on which an action at law can not be sustained, because the contingency provided for does not happen. It is sometimes applied to contracts without consideration, as was the case in *Hickman v. Grimos*, cited from 1 Marshall, 87, or where the consideration is so trifling that mere nomi-

Wills v. Cowper and Parker.

nal damages could be recovered. 2 Pow. on Cont. 243. But I can not admit the proposition, that the payment of the money in this case is a condition precedent. The engagements are simultaneous; the same day is fixed for the payment of the money, and the execution of the deed. Neither party has relied on the promise of the other, as his security, but on an actual performance.

The complainant was not bound to part with his money till he received the deed, nor was the defendant liable to be called on for a title, till the consideration money was paid. This being the case, an omission to perform, by either party, could not be considered as a forfeiture of the contract, while the other party was either unprepared, or refused to execute on his part, unless an unreasonable delay had been mutually acquiesced in, from which a voluntary abandonment *might be inferred. It is true, [152 that Wills did not pay the money on June 20th; but it is equally true that the administrator was not then either prepared or willing to convey the title.

It was attempted to support the charge of laches on the ground that time is of the essence of contracts. This principle can not be admitted to the extent contended for. The fair inference to be drawn from the cases on this point is, that time is not of the essence of contracts, or, in other words, that equity does not consider an omission to perform, on the day stipulated, as sufficient, in itself, to reject a bill for a specific performance. On the contrary, chancery will relieve, where there has been default in time, if compensation can be made; and it has been held, that lapse of time in payment, may be compensated by interest and cost, if the delay has not been unreasonable and unnecessary. Bills have been sustained in favor of vendors who had no title at the time they were to convey, or at the filing of their bills. Lord Thurlow decided that, although a contract contained a clause that it should be void if the stipulations as to time were not complied with, yet equity would not consider the performance at the day an essential part of the contract; and in the case of *Thompson, etc. v. Riddle*, he declared, that it had been often attempted to get rid of a contract on that ground, but without success; that such an omission had never been held to make the agreement void, though it might be evidence of the waiver. 2 P. Wms. 66, 629; 7 Ves. 202; New. on Cont. 235, 238, 242. It is laid down

Wills v. Cowper and Parker.

in 2 Pow. on Cont. 272, that the time limited for the performance of an agreement, having lapsed, is no solid objection to a decree for a performance of it; for it is the business of a court of equity to relieve against lapse of time, in the performance of agreements, especially if the non-performance does not arise by default of the party seeking to have a specific performance; therefore, a bill brought for a specific performance was decreed in favor of the plaintiff, without any regard to the lapse of time, the lord chancellor observing, that most of the cases relating to the execution of articles for the sale of estates were liable to that objection, but 153] that he thought there was nothing in it. *The same principle is adopted in Tyree v. Williams, 3 Bibb, 367, and in Guest v. Hamfray, 5 Ves. 818. The master of the rolls observed, that if the plaintiff stand acquitted of the charge of practicing unnecessary delay, in making out his title, the court will not refuse him a specific performance, though he suffer time to elapse before he files his bill. On looking into the cases cited from 1 Marshall, 42, 225, and 240, I do not see their application to this case. In each of them there was a total inability, on the part of the complainant, to perform, either before or after the decree; and in 1 Bibb, 590, the question did not arise on the time of performance, but on the fact, that complainant had neither performed, nor offered to do it at the time of the decree.

The conclusion, from a review of the authorities on this point, seems to be, that lapse of time will not prevent a decree, unless it has been so unreasonable, and so far unaccounted for, as to furnish evidence of an abandonment of the contract. Such an inference can not be drawn from the facts in this case. The delay has not been unreasonable, and it is satisfactorily accounted for. The complainant was not bound to part with his money, till he received a deed. The parties were to perform simultaneously. It is in proof, that, on the day fixed on for the performance, the land was in the possession of third persons, who had resided on it many years under a claim of title, founded on a written contract, made with the testator in his life, and that a bill in chancery to compel a conveyance was then pending. It also appears that a part of the land had been conveyed, by patent, to Cowper, the devisee, and that a part of it stood on entry and survey, for which no legal title had been obtained. Under these circumstances, it was impossible for the administrator to perform the contract. He could

Wills v. Cowper and Parker.

not make a deed, or deliver possession of the premises. The plaintiff, therefore, was under no obligation to pay the purchase money, nor can his equity be impaired on the ground of laches, for not having done it. As the complainant was to run the risk of the validity of Parker's title, it stood him in hand to see that the paper title was perfect, that he might avail himself of all the benefits of it. Baker covenanted to convey a legal title, which had not been acquired *in June, 1815. The complainant [154 had a right to insist on a legal title, and could not be required to accept of an equitable one. 1 Mod. 430.

To obviate the difficulty produced by these facts, it was urged, on the part of the defendants, that Wills knew them before the contract. The evidence, however, does not support this assertion. There is no proof of notice but the presumption arising from the pendency of the bill, which is of no avail, as this is not a case in which presumptive notice can be relied on. As between Wills and the persons who claimed title by that bill, it would have been notice, but not as between him and third persons. As the question here arises, he can be charged only with actual notice.

But if such notice were admitted, the consequences contended for do not follow. The contract could not be altered, or revoked, or the rights of the parties varied by it. Admitting that both parties knew of these difficulties, and with that knowledge entered into the contract, the inference would be that the vendor undertook to remove them as a necessary step to enable him to fulfill his agreement. The only use that could have been made of it by either party, would have been by way of excuse for a non-performance on the day stipulated. A large proportion of the contracts for the sale and conveyance of real estate, in the western country, have been made while the vendor had nothing more than an equitable right, resting on an entry. This circumstance has not released him from the necessity of completing his payments, if any were due, to the person of whom he purchased, and of perfecting his title.

Another circumstance that accounts satisfactorily for the non-payment of the money is the death of Baker, before the claim of Gilliland, etc., was decided, and the subsequent disavowal of the contract by Mrs. Cowper, his successor in the administration. From the death of Baker to the appointment of a successor, in

Wills v. Cowper and Parker.

April, 1817, there was no person to receive the money, nor did the appointment of the present administratrix remove this difficulty, for the fact can not be disguised that she determined to resist the contract at all hazards, which led to the depositing of the money [155] in bank instead of the actual payment of it on the *contract. In 1815, Baker was not in a situation to convey; there is no evidence that any step has been taken since that time to perfect the title; it is therefore questionable whether the defendants can now execute the contract, notwithstanding they rely so much on the supposed laches of the complainant.

The letters that have been introduced do not seem to have any bearing on the case. The one dated in May expresses a doubt whether complainant would be able to pay the money when it should become due, and requests further time; but whether he was able to pay, or whether further time was given or not, does not appear, nor is it material, as the defendants were not in a situation to demand it. The second letter expresses doubts as to the power of the administrator to convey. Whether these doubts arose from the imperfect state of the title, or a supposed defect in the power, does not appear; it is certain, however, that the doubts of a party do not affect his legal rights.

The argument drawn from the fact that the object of the testator, in directing this property to be sold, has been lost by the non-payment, would have been entitled to much weight if the omission to pay were justly chargeable on the complainant; but as it results from the inability of the defendants to perform the contract, on their part, it can not be urged to the prejudice of the complainant. It does not appear that the representatives of Parker have taken any trouble to clear or perfect the title. They seem to have been careless and indifferent about the matter, while Wills was doing all in his power to sustain the claim. No part of his conduct has evinced a disposition to abandon the contract.

The objection that no regular tender was made of the purchase money, has been already answered; it may be added, however, that as the administratrix had refused to receive the money, or execute the contract, although that fact, in a court of law, might not excuse an actual tender, yet connected with circumstances, it is sufficient in equity, where form yields to substance, and things manifestly vain and useless are not required to be done. The pro-

 Heirs of Waldsmith v. Adm'rs of Waldsmith.

duction of the money would have answered no other purpose than *to test the sincerity of the refusal to receive it, on the [156 one side, and the ability to pay on the other, which was afterward done by a rejection of the money and a deposit of it in bank.†

 HEIRS OF WALDSMITH v. ADMINISTRATORS OF WALDSMITH.

When defendants in the suit are named as administrators, evidence may be given to charge them in their individual character.

Cause of action defectively set out can not be supplied by proof.

The distributees of the personal estate of an intestate can not join in an action against the administrators for their distributive share.

THIS cause came before the court by adjournment from the Supreme Court of Hamilton county, upon a motion to set aside a nonsuit and grant a new trial.

It was an action of general *indebitatus assumpsit*, in which the plaintiffs claimed as heirs of Christian Waldsmith, and charged the defendants as his administrators. In the declaration the plaintiffs described themselves as "children of John Waldsmith, deceased, and heirs of Christian Waldsmith." Besides the usual money counts, as for money received by the defendants after the death of an intestate, the declaration contained a count alleging a settlement by the administrators with the court of common pleas, and a balance being found in their hands due to the plaintiffs, "in consideration whereof they assumed," etc. The defendants pleaded the general issue, and upon the trial the testimony offered by the plaintiffs was objected to upon the ground that it went to prove a personal liability in the administrators only, upon which they could not be sued as administrators. The court rejected the testimony, and the plaintiffs having suffered a nonsuit, moved the court to set it aside upon the ground that the opinion rejecting it was incorrect.

†NOTE BY THE EDITOR.—See also ix. 49; xviii. 67.

GUILFORD, in support of the motion :

The plaintiffs' counsel insist that in all cases, where the promise in the declaration is alleged to be made by the *administrator*, the judgment and execution must be *de bonis propriis*, and that it is only where the promise is alleged to have been made by the *intestate* [157] *teste*, that judgment is *de bonis testatoris*. *This distinction between a promise made by the intestate and one made by the administrator, or rather where the cause of an action accrued in the lifetime of the intestate, and one which originates with the administrator is taken in 4 Term, 347, and clearly established.

The reason assigned for this distinction is this, that where the cause of action originated in the lifetime of the intestate *plene administravit* may be pleaded, and the judgment must be *de bonis testatoris*; but where the cause of action arises from the promise of the administrator *plene administravit* can not be pleaded, and the judgment must be *de bonis propriis*.

The same distinction is recognized in 1 Term, 691; 1 H. Black. 79; 2 Bos. & Pul. 424.

The heirs of Christian Waldsmith had no cause of action against their ancestor, and the declaration states the promise to have been made by the administrators.

STOREY, for defendants :

The defendants are sued in a special character. The process; as well as the declaration, describes them to be administrators; and it is contended the judgment, if any can be given by the court, must follow the pleadings. It is believed no case can be found where a judgment has been rendered, *de bonis propriis*, in the first instance, against executors or administrators, when they are sued as such. The universal practice, even in the English courts, is to grant judgment *de bonis testatoris*, and compel the party to resort to his *scire facias* against the defendants before a personal liability can be imposed. *Rodgers v. Jenkins*, 1 Bos. & Pul. 383; 8 Term, 416; 2 Tidd's Practice, 842; *Farr v. Newman*, 4 Term, 648.

In the present suit, the several counts charge the defendants with personal liabilities only. The account stated is between the defendants, as administrators, and the court of common pleas, sitting as a court of probate. The other counts charge the defendants with moneys had and received by them to the plaintiffs'

Heirs of Waldsmith v. Adm'rs of Waldsmith.

use. To admit evidence to support this declaration, therefore, would not only be variant from the first principles of pleading, but it *would introduce the greatest laxity in practice. It would [158] dispense with the usual formalities of process, as the plaintiff could discharge the defendants personally, no matter in what relation they are sued, and, *e converso*, charge the defendants in a special character, when declared against as individuals. The decisions on this point do not conflict; they unite to establish the proposition urged by the defendants, to its fullest extent. 1 *Ld. Raym.* 437; *Nicholas v. Killigrew*, 4 *Term*, 374; *Jennings v. Newman*, 1 *H. Bl.* 108; *Rose v. Bowler*, 2 *Bos. & Pul.* 424; *Brigdon v. Parkers*, 2 *Saund.* 329, in note; *Centre v. Phelps*, 8 *Johns.* 440.

The character in which the defendants are sued entitles them to file the plea of *plene administravit*, a notice of which is to be found in the record of the cause; and it is believed there is no precedent of a judgment absolute *de bonis propriis*, over that plea, even if it should be found against the defendant. Again, the statute of Ohio (22 *Ohio Laws*, p. 128, sec. 16), has given to executors and administrators the privilege of appeal, without bail, from all judgments rendered against them in that relation; and the whole benefit of this salutary remedy would be lost if the plaintiffs' position should be sustained, that under this declaration the defendants can be personally charged.

Opinion of the court, by Judge BURNET:

At the trial of this cause, it was proposed, on the part of the plaintiffs, to prove that they were children of John Waldsmith, and heirs of Christian Waldsmith, deceased—that the defendants were the administrators of C. Waldsmith, and that on settlement of their accounts before the court of common pleas, a large sum was found in their hands belonging to the heirs. This testimony was rejected, and a judgment of nonsuit entered.

On a motion to open the nonsuit; and grant a new trial, the question was, whether the court erred in overruling the testimony. In examining this case, it is necessary to look at the declaration. The defendants are charged as administrators of C. Waldsmith, deceased; the plaintiffs are described as "children of John Waldsmith, deceased, and *heirs of C. Waldsmith, deceased." It [159] is averred, "that the said defendants, administrators of C. Waldsmith, deceased, accounted with the judges of the court of common

pleas, of and concerning the goods and chattels, moneys and effects, which were of said Christian at the time of his death, and which, before that time, had come to their hands to be administered; and, upon such accounting, the said defendants were then and there found to be in arrear, and indebted to the said plaintiffs in the sum of two thousand three hundred and fifty-eight dollars and seventy-four cents, and being so found in arrear and indebted, they, the said defendants, in consideration thereof, undertook and promise," etc.

The declaration also contains the common money counts, in which the defendants were not named as administrators.

It was contended by the defendants at the trial, that the judgment against them, on this declaration, must be *de bonis testatoris*, while the facts charged, if they rendered them liable at all, made them so in their individual capacity.

The plaintiffs insist, first, that the judgment must be *de bonis propriis*; and secondly, that the facts charged, supported by the proof they offered, are sufficient to entitle them to such a judgment.

These propositions must be separately considered. There appears to be some discrepancy between the authorities relating to the first point, which, on a superficial view, would seem to create a doubt.

It is true, as a general proposition, that in actions against executors or administrators, the judgment must be *de bonis testatoris*, and that it is necessary to resort to a *sci. fa.* in order to charge them with a personal liability; but this is to be understood as applying to cases in which they are liable only in that capacity, and not to those in which there is an individual liability. If the action is founded on a promise, made by the testator or intestate, in his life, the defendant must be sued in his representative character; he may plead *plene administravit*, and the judgment must be *de bonis testatoris*; but, if the plaintiff rely on a promise by the executor, after the death of the testator, it is not necessary to name the defendant as executor, yet this may be done; they may be named as administrators by way of description, or for the purpose of showing the circumstances of the transaction, *and the origin of the liability; but the defendants can not plead *plene administravit*, and the judgment should be *de bonis propriis*. In such cases, the plaintiff is at liberty to describe the defendants as executors or not,

at his election. The form of the judgment is not necessarily controlled by that description, where it sufficiently appears that it is given merely as a *descriptio personæ*, and not as an indication of the capacity in which the liability attaches. If the declaration presents a claim, to which the defendant is liable in his representative capacity only, as on an obligation executed by the testator, he must be sued as executor, and the judgment must be *de bonis testatoris*; but if it present a demand, which originated from the acts of the defendant, in his capacity of executor, but for which he has become individually liable, as if he should settle a debt due from the estate, and give his own note in the character of an executor, he may be described in the writ and declaration as executor, or that description may be omitted, and in either case the judgment would be *de bonis propriis*. So in the case before us; the property of the intestate was received and disposed of by the defendants, as administrators; the money claimed in this suit was obtained, and is now held by virtue of their power as administrators, but having closed the estate, and settled their accounts, by which the net amount is ascertained, they hold that amount for the use of the heirs, and are liable in their individual capacity. Their liability, however, does not depend on the simple fact that they are administrators, but on the subsequent transactions which have brought the estate into their hands.

As regards creditors, the right of action against the intestate is converted, by operation of law, into a right against the administrators. They are liable to the creditor, because the intestate was so liable, and as the remedy must pursue the right, it must charge them in their representative capacity. But not so in the case of heirs; no right of action vested in them against their ancestor, and consequently none has been transferred against the representative. Their right had no existence till after his death, and it was then contingent, depending on the result of the settlement of the estate. It was, in fact, the right of the ancestor, [161 transferred by operation of law, and not a right against the ancestor.

The property was received, and converted into money for their use. The defendants became liable as agents, in the same character in which they would have been liable to the intestate, had they disposed of the property in his life, and by his authority. In other words, they are under an individual liability, on which an

Heirs of Waldsmith v. Adm'rs of Waldsmith.

action could be sustained against them in that character. The words "as administrators," in the writ and declaration, may be considered as descriptive of the *persons* sued, and not of the *character* in which they are sued, or they may be treated as surplusage. No person can read the declaration, and notice the manner in which the liability of the defendants arose, without discovering at once the character in which it is intended to charge them. As administrators of the deceased, they received and disposed of the property, paid the debts, and settled with the court. These transactions were authorized and required by the letters of administration; they form a part of the plaintiffs' title, and it was proper to set them out in the declaration, but as they show an individual liability, the judgment must be *de bonis propriis*. This conclusion seems to follow from the authorities on the subject. The case of *Wallis v. Lewis*, *Ld. Raym.* 1215, was by an executrix, on a promise made to herself, as executrix. On a motion in arrest of judgment, the court decided that the declaration being grounded on a promise to the executrix herself, the naming her executrix was but surplusage. This point, however, was ruled differently in *Elwee's executrix v. Mocater*, in the same book, page 865, but it was decided in the same way, in *Nicholas v. Killigrew*, *1 Ld. Raym.* 436, which was *indebitatus assumpsit*, by an administrator to recover money paid to a third person, after the death of the intestate, for the use of the plaintiff as administrator. In *Jenkins and wife v. Plume*, *1 Salk.* 207, and *6 Mod.* 92, which was *assumpsit* by executors for money had and received by the defendants, to their use, as executors, the action was held to lie, and that the naming them-
 162] selves executors was only to deduce their right, and *set it forth *ab origine*. *Marsh v. Yellowly*, *2 Stra.* 1106, was decided on the principle, that on a promise made, or a wrong done to the executor himself, he may sustain an action in his own name, or as executor, and it was held that in either case he was liable for cost. In *Hooker v. Quilter*, *Ib.* 1271, the declaration contained three counts, as executrix, and one for the use and occupation of the plaintiffs' house. There was judgment by default, which was reversed on error, for, said the court, there *being no verdict*, they could presume nothing but that the fourth count was, as it appeared, in her own right, which could not be joined with the others. In the final determination of *Jenkins and Plume*, as reported in *6 Mod.* 181, the court says, "The plaintiff needed not have named himself

executor, it being on a contract with himself. His saying that it was to his use, as executor, is true, and therefore no harm, but rather better, for it shows how the right came." The cases cited from 4 Term, 347, and 2 Bos. & Pul. 424, do not meet the question before us. It was decided in those cases, that counts on promises made by the testator in his life, could not be joined with counts on promises made by the executor, as such, because they admitted of different pleas, and different judgments; but it seems to have been understood that separate suits might have been sustained against the executor, on those promises, naming him as executor, and that on the latter, the judgment would have been *de bonis propriis*, although the defendant was named as executor. The same remark applies to the authority from 2 Saund. 328. The cases there referred to relate to the doctrine of joinder of actions, and were cited for the purpose of showing that money claimed by, or from executors, in different rights, could not be united in the same declaration, which is a question altogether different from the one now under discussion. We should not expect to find the present question determined, in cases of that character, but as far as they have a bearing on it, they seem to support the declaration before us. The author of the note admits, that a count, or an account stated, with an executor, for money due from the testator, may be joined with a count on a promise made by the testator; and though he *strongly doubts the doctrine in *Petrie v. Hannay*, 3 D. & E. [163 659, in which it was laid down that several counts may be joined, for money had and received by the defendant, to the use of the testator, and *to the use of the executors as such*, yet Buller, Justice, confidently affirms that such was the constant practice. The case of *Hooker v. Quilter*, before cited, seems to imply the same thing.

In *Carter v. Phelps' administrator*, 8 Johns. 440, it was admitted that a count charging an executor as being liable in his own right, on a cause of action arising after the testator's death, can not be joined with one on a promise made by the testator in his life; but it was decided that a count, on a promise made by an executor or administrator *as such* in which he is *not charged as personally liable*, may be joined with a count on a promise made by the intestate, and by a parity of reasoning, a count, on a promise by an executor, in which he is named as executor, but charged as in his own right, may be joined with a count on a promise in which he is not named as executor. In both cases the demand is made in the same right,

Heirs of Waldsmith v. Adm'rs of Waldsmith.

and the plea and judgment are the same in both. In *Myer v. Cole*, 2 Johns. 350, the cause of action stated in one count, arose after the death of the testatrix, and the promise was not alleged to have been made by the executors, as such; but the point decided in that case does not arise in the case before us. It is, however, plainly to be inferred, from the language of the court, that in an action against executors, for a cause arising after the death of the testator, and for which they are personally liable, they may be named as executors, as a mere *descriptio personæ*, and consequently that the judgment, notwithstanding they are so named, will be *de bonis propriis*. In *Hooker v. Quilter*, as reported in 1 Wils., the chief reason against the joinder was, that the court could not say what damages the plaintiff was to have, as administrator, and what in *proprio jure*. The reason of the decision, therefore, has no application to the present case. It was also stated in that case, that if an executor name himself executor, when he may sue without, as in an action for rent, both in the life of the testator, and after his death, it is *but surplusage*, and this is the most that can be said in the present case.

164] *It was not necessary to sue the defendants, as administrators, for although their liability arose from their acts as administrators, yet they were responsible in their individual characters, and the naming of them as administrators is merely a *descriptio personæ*. It may be treated as surplusage, or as intended to show the nature and origin of their liability. It can not affect the form of judgment.

The case of *Barry v. Rush*, 1 Term, 691, cited by plaintiff, does not bear on this case. The point there settled was, that an administrator, by entering into an arbitration bond, admitted assets and could not afterward plead *plene administravit*. The case of *Farr v. Newman*, 4 Term, 621, cited by both parties, appears equally inapplicable. The point discussed and decided in that case was, that the goods of a testator, in the hands of his executor, were not liable to be taken and sold, on an execution, for the private debt of the executor, to the exclusion of judgments for the proper debts of the testator. The same remark applies to the case of *Rogers v. Jenkins*, 1 Bos. & Pul. 383. The point there settled by Eyre, Chief Justice, was, that if process issue in the name of one plaintiff, and a declaration be filed in the name of him and another, judgment will be set aside for irregularity. In the marginal note to this case, it is stated that in *Canning v. Davis*, Yates, Justice, decided that though a

plaintiff style himself executor, or give himself any other superfluous description, it will not hurt, for the demand is still the same. Section 16 of the act defining the duties of executors and administrators has also been referred to on the part of the defendants. On a careful examination of that section, the true construction of it will be found to be this, that the judgment of the court against executors, or administrators, in all cases in which it is properly rendered *de bonis testatoris*, shall only subject the defendants to the amount of assets in their hands *unadministered*, whatever may have been the form of pleading. It can not, therefore, affect the present question. It contains no direction as to the description of cases in which the judgment shall be *de bonis testatoris*, although it appears to have been cited for that purpose.

The best view we have been able to take of this subject, *conducts us to the conclusion that there was no impropriety in describing the defendants as administrators—that that circumstance does not preclude them from taking their judgment *de bonis propriis*, and that there is nothing incompatible in the different counts contained in the declaration. [165

The second proposition is, that the facts stated in the declaration, supported by the proof offered at the trial, were sufficient to entitle the plaintiffs to a verdict.

It is a well-settled principle that every declaration must set out a good title. It must show such facts, as, if true, entitle the plaintiff to a judgment. The omission of a material averment can not be supplied by testimony at the trial. The plaintiff's evidence must correspond with his case—he can not extend it to aid a defective title; and although the evidence offered may present a clear case for the plaintiff, yet, if it be not the same case found in the declaration, the court will reject it, although the consequence may be a nonsuit.

Evidence, being that which ascertains and illustrates the point in issue, must be confined to that point. Without an observance of this rule uncertainty and confusion would ensue. The records of adjudged cases would not show, with any degree of certainty, the grounds on which recoveries were had; nor would it be possible to conduct judicial proceedings with that precision and certainty which is justly ascribed to the science of special pleading, and is so essential to a safe and uniform administration of justice. It can scarcely be necessary to refer to books in support of these principles—they are found everywhere.

Heirs of Waldsmith v. Adm'rs of Waldsmith.

The plaintiffs in this case claim as heirs at law to the intestate, and the suit is brought for their distributive share of the personal estate. It is not pretended that any express promise has been made. The action is grounded on the legal liability of the defendants, and the implied undertaking which the law infers from it. The fact that the plaintiffs are children of John Waldsmith, deceased, does not constitute them heirs of C. Waldsmith; nor does it, in connection with the other fact, that the defendants, as administrators, have settled the estate and retain a residuum, show [166] any liability to these plaintiffs, because that fact may *be true, and the plaintiffs be destitute of any right to recover. To show the existence of that right two additional facts are necessary, viz: that they are grandchildren of the intestate, and that the intestate survived their father. It is not stated that John was the son of Christian, nor does it appear which was the survivor. The former of these facts constitutes the foundation of the claim, and the latter is equally important; for if the father survived the grandfather he was the heir; the right vested in him at the death of the intestate—it continued in him till his death, on which it descended to the plaintiffs, who must claim it as a part of their personal estate, through his executors or his administrators, and not as heirs at law to their grandfather—which would be presupposing that the right, at the death of their father, reverted in their deceased grandfather for the purpose of descending to them, which would be an absurdity. As the declaration describes the plaintiffs to be the children of John Waldsmith, it is not enough to add "and heirs of Christian Waldsmith;" that does not follow as a consequence of the fact stated.

The rule that plaintiffs, who claim as heirs, must show how they are heirs, applies in this case, and it is understood that this relates to the declaration as well as the evidence given at the trial.

If the defendants are liable in this action, it is on the concurrence of a variety of facts, which, taken together, constitute a title in the plaintiffs, but can not be proved unless they are relied on and stated in the declaration. A good title, defectively set out, may be supplied at the trial, but not so where the title itself appears to be defective.

It can not be pretended that a plaintiff who sues as an heir, and simply avers that he is an heir, sets out a good title, and yet this is the amount of the declaration in the present case. Without

showing any privity, or liability, or any ground of an implied undertaking on the part of the defendants, it is averred that they accounted with the judges of the court of common pleas, and were found in arrears and indebted to the plaintiffs. Their indebtedness to the plaintiffs, in any amount, depends on the fact of heirship, which is not shown; and the amount of that indebtedness *depends on the [167 number of heirs, their respective degrees of consanguinity, and the total amount of residuum, ascertained by the settlement, respecting which the declaration is entirely silent. If the plaintiffs be heirs of the intestate, they take *per stirpes*, and the share to which they have a claim depends on the number of children who survived the intestate, or who might have died before him, leaving issue.

It was proposed to supply all these omissions by proof at the trial, or, in other words, to make out a title before the jury, which was not found in the pleadings. We are of opinion that this could not be done. But there is another inquiry involved in this branch of the case, equally decisive. On what principle of law have the plaintiffs joined in this action? We learn, though not from the pleadings, that they are the grandchildren and a part of the heirs of C. Waldsmith, among whom the administrators are directed by the statute to distribute, in equal shares, that portion of the personal estate of the intestate that their deceased father would have inherited, had he survived him.

In regard to real estate, parceners have but one entire freehold, and must join in real actions; but this claim rests on different grounds—as between the plaintiffs there is no joinder of contract, or of interest; their rights are separate and distinct. The defendants are answerable to them severally, and each of the heirs has a right to demand and receive his separate share of the residuum. In order to sustain a joint action, in any case, there must be a joint interest, as the proof must sustain the case made out in the pleadings. If two or more unite in one suit, they can not sustain it by proof of distinct, unconnected claims, and perhaps a case could not be selected better calculated to illustrate the position than the one in hand. C. Waldsmith died intestate, leaving several children and grandchildren. The plaintiffs are the children of his son John, whom he survived, and the defendants are his administrators. The suit is brought to recover, in one entire sum, the distributive shares of the personal estate, claimed

Heirs of Waldsmith v. Adm'rs of Waldsmith.

by three of the heirs. The bare statement of the case shows that 168] they have not one entire claim, but that their claims are *separate and distinct. Were it otherwise, the unity of interest would extend to the whole estate, and require all the heirs to join. It will not be pretended, that the administrators have not a right to settle with the heirs separately, and take from them releases, without affecting the rights of other heirs; and it is well known to be the constant practice for administrators to make partial advances to the heirs, from time to time, as they may require it, which necessarily leaves unequal balances due.

In a joint action this inequality can not be regarded. The plaintiffs can not obtain separate judgments, nor can the judgment designate the amount due to each; it must be for an entire sum, in which they will have an equal right. On this principle, each heir would be bound by the acts of his co-heirs, who might receive and release to the administrators the whole personal estate. But the language of the statute seems to put this question at rest. It enacts, "that if any person shall die intestate, leaving any goods, chattels, or other personal estate, such goods, chattels, or other personal estate, shall be *distributed* agreeably to the foregoing course of descents." The right of the plaintiff is derived from this statute, which directs the administrators to distribute, or pay to each of them the share designated in the preceding sections.

Inasmuch, then, as it is made the duty of the administrators to pay to each heir the share designated by the act, and as the right of the heir to demand arises from the duty of the administrator to pay, the right must follow the duty; of course each heir must have a separate, distinct, and independent claim, to his distributive share. Such claims can not be joined in one suit, without violating the plainest rules relating to the joinder of actions.

Motion overruled.†

†NOTE BY THE EDITOR.—Surplusage, when, vii. 268, part 1; vi. 92. When coparceners, etc., must join in suits concerning their common estate, see vii. 111, part 2; x. 442.

*CASE AND DAVIS v. MARK.

[169]

Distinction between case and trespass: Whenever the injury is direct and immediate, trespass is the proper action.

Where trespass is the proper action, plaintiff can not at his election bring case.

THIS cause came before the court upon a writ of error to the common pleas of Hamilton county, and was reserved for decision here by the Supreme Court of that county.

It was an action on the case, and the declaration contained a single count, in which it was charged, that the defendant "so carelessly and negligently navigated his steamboat upon the Ohio river, that he run foul of, and struck the flat-boat of the plaintiffs, by means whereof it immediately sunk, and was lost to the plaintiffs."

A verdict was rendered for plaintiffs upon trial; the defendant moved in arrest of judgment, upon the ground that the facts stated in the declaration constituted a direct trespass, for which an action on the case would not lie. The court of common pleas arrested the judgment, to reverse which, error was brought, and the general error assigned.

J. W. PIATT, for plaintiff in error:

The action is properly brought upon two grounds:

1. Case is always the correct form of action where the injury is done by vessels running foul of each other, at sea or in rivers.
2. In cases like this the plaintiff may elect to waive the trespass, and go only for the consequential damages.

The following authorities sustain the first position: *Ogle v. Barnes*, 8 Term, 188; *Huggit v. Montgomery*, 2 New Rep. 446; *Nicholas v. Murray and Syms*, 15 East, 384; *Turner and others v. Hawkins and others*, 1 Bos. & Pul. 472; *Cooper's Justinian*, 628, 629; 2 *Chitty*, 283.

The injury, in the cases cited, would seem to have been direct, inasmuch as it proceeded from the direct contact of the vessels; yet case was held to lie.

In support of the position, that the plaintiff may, in certain

Case and Davis v. Mark.

cases, waive proceeding for the immediate injury or force, and form his action to recover consequential damages, the following cases are cited: 1 Chitty, 127; Pitts v. Gaines and others, 1 Salk. 10; Slater v. Baker, 2 Wils. 359; Scott v. Shepherd, 2 W. Black. 897; Swift's Digest, 539-541, 551, 552; Ogle v. Barnes, 8 Term, 170] 188; *Rogers v. Enbleton, 2 New Rep. 117, 118; Huggit v. Montgomery, Id. 447, note 1; Blue v. Campbell, 14 Johns. 432; Percival v. Hickey, 18 Johns. 288.

T. HAMMOND, for defendant in error:

The terms used in the plaintiffs' declaration, that the boat "*immediately sunk*," are the same always used by the courts in distinguishing trespass from case. Where the injury is immediate, trespass alone will lie; and whether the act be committed willfully or negligently, is immaterial. Tayler v. Rainbow, 2 Hen. & Mun. 423; Leane v. Bray, 3 East, 593. The ancient doctrine was the same. 2 Ld. Raym. 1402; 1 Strange, 634; 5 Term, 649; 6 Term, 130.

Covel v. Laming, 1 Camp. 497, was a case of one vessel running foul of another, and very similar to this. Lord Ellenborough was clear that trespass only could lie.

Upon his second point, the authorities cited by the plaintiffs' counsel, do not support the position taken. In Swift's Digest, 541, this doctrine is noticed as having been advanced, but is declared to have been overruled, and 3 Conn. 64, is referred to. There is some apparent contradiction in the cases as to the facts that constitute trespass, or upon which case must be brought; but upon examination it will be found, they all agree that where the act is direct and immediate, trespass only can be sustained.

Opinion of the court, by Judge BURNET:

The error assigned in this case is, that the court of common pleas arrested the judgment, on the ground that the facts amounted to a trespass *vi et armis*, and that this action could not be sustained. It became necessary, therefore, to ascertain the distinction between trespass and case, and apply it to the facts and circumstances set out in the declaration.

The plaintiffs charge that the defendant was the owner and commander of a certain steamboat, called the Congress, navigating the Ohio river—that he so carelessly navigated, managed,

and steered the said steamboat, that he run her foul of, struck, and broke a certain coal-boat, *owned and navigated by the [171 plaintiffs, by means of which the said coal-boat immediately sunk, and was lost.

The plaintiffs contend that the injury here described was consequential and not direct; but if direct, that it was the result of negligence, and that in either event, the action ought to be case.

The first part of this proposition certainly can not be sustained. The terms consequential and immediate are well understood. That is immediate which is produced by the act to which it is ascribed, without the intervention or agency of any distinct, immediate cause, but the effect of an intermediate cause is sometimes considered as a trespass, produced by a preceding cause, when the former is the immediate effect of the latter. Thus, the effect of pulling the trigger of a loaded gun is the production of fire, which causes the powder to burn, which gives motion to the ball, by which the injury is produced; here the whole transaction is considered as one act, and the trespass is ascribed to the pulling of the trigger, though the injury is the immediate effect of an intervening cause, which gave motion and force to the ball. So in the case of the lighted squib, although it would have been harmless to the plaintiff, without the agency of Willis and Ryal, yet as they acted in self-defense, to avoid the danger produced by the agency of the defendant, their conduct was ascribed to him. All that was done subsequent to the original throwing was considered as a continuation of the first act, and the putting out of the plaintiff's eye, was declared to be the immediate effect of that act. In this case the defendant was at the helm, directing the course of his boat—the steam which gave it motion was under his control; the boat therefore received its motion and course from the defendant, by which it was made to strike the plaintiffs' boat, so that it was broken, and immediately sunk. Here there was no distinct intermediate agency. The injury was the breaking and sinking of the coal-boat—the cause of that injury was the act of the defendant, in running the steamboat against her. The injury, therefore, can not be considered as consequential—it was direct and immediate.

The second part of the proposition is equally untenable. The *defendant could not shelter himself under the plea of neg- [172 ligence, and the plaintiffs are not at liberty to force on him an

Case and Davis v. Mark.

apology of which he could not avail himself. The character of the transaction, in reference to the form of the suit can not be affected by the presence or absence of negligence. That circumstance may, in some cases, have an impression on the amount of damages recovered, by varying the degree of malice, but it can not change the nature of the act. If it has the ingredient that stamps it with the character of a trespass, it must be treated as such. If a man shooting at game, does it so carelessly and negligently as to wound a person happening to be in the vicinity, the fact that it was done carelessly, and without design, will not protect him from an action of trespass. So if a man in self-defense, aims a blow at another, and by negligence or want of care strikes a third person, it is a trespass.

The proposition set up by the plaintiffs that where there is negligence, although the injury be immediate, the party may waive the immediate injury, and claim the damages only which is the consequence of the injury, amounts to this, that he may take up an entire, connected transaction by parts, and rely on as much of it as will answer his purpose, to the exclusion of the residue. This would be a convenient privilege, as it would often save a plaintiff from the unpleasant consequences of a nonsuit; but it would destroy established distinctions, and introduce an uncertainty in judicial proceedings which would be inconvenient and injurious. One of the reasons given for not sustaining actions on the case, where the circumstances amount to a clear trespass, and *vice versa*, is the necessity of preserving the boundary of actions, by which I understand the rules that prescribe what particular action or form of suit, shall be brought for each particular injury. These rules can not be uniform, if plaintiffs are permitted to garble their cases, so as to convert an unequivocal trespass, into trespass on the case. Were this permitted, I can not conceive of any trespass that may not be sued for in the form of case. What are the ordinary concomitants of a severe battery? They are plain, bodily and mental—incapacity for business—the expense of medical aid, and dis-
173] grace in the public estimation. *If under the pretense of waiving the immediate injury, which is pain, the party may go for the consequential damage, which is the incapacity for business, expense, etc., it will be a matter of but little moment whether he sue in trespass or in case, as the only difference in the result would be the portion of damage that might be allowed for the

Case and Davis v. Mark.

pain inflicted. If this be conceded, the boundary between trespass and case is at once broken down—courts have no control over it—it is in the power of every plaintiff, and may be varied as the convenience of the moment may require. Should a party mistake his remedy, and sue in case for an undoubted trespass, he has only to turn on his opponent, and say, I waive the immediate injury, and he is perfectly safe. I have looked into the authorities cited to this point, and although some of them seem to be in opposition to the general tenor of the cases on the subject, I can not believe that they sustain the plaintiffs. *Turner v. Hawkins*, 1 Bos. & Pul. 472, was a writ of error, after verdict. The court put the case entirely on the ground of a nonfeasance, which they said made it a complete action on the case. They referred all the circumstances alleged, to the not slackening of the rope, by the defendant's servants, as they were bound to do, and having done so, they declined looking into the cases cited to show the distinction between trespass and case.

In *Pitts v. Gaince*, etc., 1 Salk. 10, the question settled was, that the captain of a vessel lying in port, not being the owner, may maintain case against an officer, who unlawfully detains her in port, for the particular loss he has sustained, by the detention of the voyage, or may bring trespass, founded on his possession, as the bailiff of goods may.

In *Slater v. Baker*, 2 Wils. 359, the injury complained of proceeded from ignorance and want of skill, in the defendants, who had been employed as surgeons by the plaintiff. After verdict, the court refused to look with eagle's eyes, to see whether the evidence applied exactly to the case or not, but they settled no point relative to the distinction between case and trespass, or the right of a party to waive a direct trespass, and bring case for consequential damage.

Huggit v. Montgomery, 2 New Rep. 446, was an action *of [174 trespass against the master of a vessel for an act of the pilot, done while the defendant was on board but not by his order. The court do not give the reason of their opinion, but from an observation of *Chambre*, Justice, it appears to have been that the master was not liable to an action of trespass for the act of the servant, done without his order.

In *Rogers v. Enbleton*, Id. 117, the marginal note cited, and relied on by the plaintiff, does not appear to be supported by the

Case and Davis v. Mark.

text. The distinction, however, between trespass and case, was not agitated, nor do the court refer to it in their opinion. The editor has taken it for granted, that it was an action on the case, but the defendant's counsel did not so consider it, or they would not have assigned, as a cause of demurrer, the omission of the words *vi et armis*, and *contra pacem*, nor would the court have gravely decided that because the injury was alleged to have arisen from mere negligence, the words *vi et armis* and *contra pacem* were not necessary in an action on the case. Those words have no place in such a declaration—their presence would have been a cause of demurrer, rather than their absence.

Ogle v. Barnes, 8 Term, 188, has also been cited. At first view it would seem difficult to reconcile this case with the mass of cases reported on the same subject, or with the rule adopted by the chief justice, in the case itself, which was, that if the act occasion an immediate injury to another, trespass is the proper remedy, but if the injury be not immediate but only consequential on the act done, case must be brought. But a careful examination, after reading the explanation given of it in *Leame v. Bray*, will remove the difficulty. It could not have been the intention of the court to shake the rule established by so many preceding cases, because they expressly recognize it, and because they have put their decision on a different ground, to wit: that it did not appear that the injury proceeded from the personal acts of the defendants, or that they were even on board of the vessel at the time.

The passage referred to in *Chitty* does not lay down a general rule. It merely states that the party injured has sometimes an election, which is all that can be gathered from the cases he [175] cites, most of which I have noticed above. *The case of *Blin v. Campbell*, 14 Johns. 433, appears to go the whole length contended for by the plaintiffs; and although that decision was recognized as being correct, in *Percival v. Hickey*, 18 Johns. 288, on the authority of *Chitty*, and the cases cited by him, yet we can not adopt it for the government of this case. Some of the references in *Chitty* do not touch the point, others are equivocal, and as far as they go to establish the doctrine contended for, they are opposed by others, which we think they ought not to control.

The uncertainty that exists in cases of this character, may be ascribed, in some measure, to the decisions that have been made in case for running down ships, where the force that causes the in-

jury does not always proceed from the agency of the person having the management of the vessel. Winds, waves, and currents may counteract his designs, by moving the ship in a course he has endeavored to avoid. It may be easy to determine the presence of this agency, but difficult to ascertain the extent of its effect. On a supposition that the defendant's vessel has been taken to the point where the injury was done, without his agency, or in opposition to his efforts, honestly made to prevent it, it would be hard to declare him a trespasser. The impossibility of knowing with certainty the real extent of this extraneous cause, and how far it might have been in the power of the defendant to counteract it, or whether his efforts by miscalculation or design, did not co-operate with it, renders it difficult to apply a uniform rule. But this difficulty can not be found in cases that receive an unequivocal character from the certainty of the facts on which they depend.

Something may also be ascribed to the reluctance with which courts yield to the necessity of deciding against a just claim, on a technical objection, or of turning a party round, because he has mistaken his remedy. In some instances this feeling has induced judges to avail themselves of circumstances in support of a case, having justice and equity on its side, that do not form a legal distinction, or bring it within any established rule. The same circumstances are relied on in other cases, which tends to render *the [176 law apparently doubtful. For example, in some cases we find the lawfulness or unlawfulness of the act much insisted on, from which an inattentive reader might conclude that that circumstance formed the rule of distinction between trespass and case; but it is well known that acts strictly lawful frequently amount to trespass, while those that are not unlawful are attended with injuries, for which trespass can not be sustained. Thus, if a man shooting at a target, which is lawful, miss his aim and wound another, trespass will lie; but if he dig a pit in the highway, into which a traveler falls, trespass will not lie, although the act was unlawful.

In some cases, great stress is laid on the force that accompanies the act, by which an injury is done, but this is not a distinguishing fact—it forms no criterion by which to decide the character of the injury, or of the remedy. This will appear from the very familiar case of the log: if it be thrown into the highway with great force and violence, and afterward a traveler falls over it, he can not have trespass; but if it be laid very gently on his foot, by which

he is injured, trespass will lie. So if a man quietly enters the inclosure of his neighbor and picks up an apple, trespass will lie; but if he should, by forcible and violent effort, obstruct a water-course, whereby the water is caused to flow back on his neighbor's land, it would not be a trespass—he would be liable only in an action on the case.

It has also been contended, as it is in this case, that when the act from which the injury proceeds, was done willfully, trespass is the proper remedy; but not so when it is the effect of carelessness, or negligence. But this distinction can not be sustained, as will be evident from a little reflection. In the cases before mentioned, the log was thrown into the highway, and the water-course was obstructed intentionally, and it might be, to produce the very injury that ensued, but trespass could not be maintained. On the other hand, if, while a person is carelessly handling a loaded gun, he should unintentionally cause it to go off and wound another, trespass would lie, although the act was not willful, and the injury was the effect of negligence. So if a man should carelessly throw 177] a brickbat from the scaffold and *unintentionally wound another, trespass would lie. In *Leame and Bray*, it was proved that the accident happened from negligence, and not willfully, yet it was decided that trespass was the proper action. So in *Weaver and Ward*, where the defendant, exercising in the trained bands, fired his musket, and by accident hurt the plaintiff, it was trespass; and where a person suddenly turning round knocked another down, unintentionally and without seeing him, trespass was holden to lie.

The true distinction unquestionably is, whether the injury be immediate, or consequential, as will appear clearly from the authorities.

Taylor v. Rainbow, 2 Hen. & Munf. 436, was trespass on the case, for shooting off a gun in a place where many people were assembled, so carelessly and negligently, though without any design to injure the plaintiff, that the contents of the gun struck his leg, and wounded him, in consequence of which wound his leg was amputated—he was unable to attend to his business, and put to great expense, etc. It was contended that the plaintiff had mistaken his action, and that the defendant could be made answerable only in an action of trespass *vi et armis*. The whole court were of that opinion, on the ground that the injury was immediate, being occasioned by the discharge of the gun. Judge Roane remarked, that

 Case and Davis v. Mark.

there was no position in the law more clearly established than this, that wherever the injury is committed by the immediate act complained of, the action must be trespass. *Covel v. Laming*, 1 Camp. N. P. 497. In this case the defendant was the owner of a ship: being on board, and standing at the helm, he unintentionally, and through ignorance and want of skill, run her against the plaintiff's ship in the river Thames. The action was trespass. It was contended for defendant, that the action could not be sustained, unless the act were willfully done, and that it was willfulness alone that could determine the nature of the act. Lord Ellenborough declared he had always been of opinion, that the only just and intelligible criterion of trespass and case, was, whether the injury complained of arose directly, or followed consequentially from the act of the defendant. That as the defendant at the helm guided his vessel, [178 the winds and waves being only instrumental in carrying her along, the force proceeded from him, and the injury was the immediate effect of that force.

Reynolds v. Clarke, 2 Ld. Raym. 1399, was an action of trespass for putting up spouts to the defendant's house by which the water was collected in great quantities, and thrown onto the plaintiff's land, by reason whereof, etc. The question was, whether case or trespass was the proper action. The court decided the distinction in law to be, where the immediate act itself occasioned a prejudice, or is an injury to the plaintiff, or where the act itself be not an injury, but a consequence from that act, is prejudicial to the plaintiff; that in the first case, trespass *vi et armis* will lie; in the last, it will not. And in remarking on the case of *Preston v. Mason*, cited at bar, from Hard. 61, the court observed, that case might be law, because it was laid, that the defendant made the water to run; which was the same as if it had been laid, that the defendant poured the water; in which case trespass would have lain, because the immediate act of pouring would have been a trespass. In the report of this case, as we find it in Stra. 634, the chief justice is represented as saying, if the action in the first instance be unlawful, trespass will lie; but if the act be *prima facie* lawful, and the prejudice to another is not immediate, but consequential, it must be an action on the case; but the chief justice, in his own report of the case lays no stress on the lawfulness, or unlawfulness of the act.

Savignar v. Roome, 6 Term, 125, was an action on the case, for driving willfully against the plaintiff's carriage, whereby it was in-

Case and Davis v. Mark.

jured. After verdict, judgment was arrested, because the injury was immediate, and the action, if any could be sustained, should have been trespass.

In the case of *Scott v. Shepherd*, as we have it reported in 2 Blac. and 3 Wils., where there was no diversity of opinion as to the rule, that where the injury is direct and immediate, the action should be trespass. The disagreement was as to the proper inference to be drawn from the facts of the case. Judge Blackstone considered the injury as proceeding from the person who last threw the squib, and not from the defendant. The other judges considered that [179] after the first act of throwing the squib, the different directions which it received from other hands was a continuation of the first act of the defendant, and that the injury was the immediate consequence of that act, and on that ground the action of trespass was sustained.

In *Howard v. Banks*, 2 Burr. 1114, the distinction between trespass and case was recognized to be this: immediate damage to the plaintiff's property is a ground for trespass, consequential damage to it is a ground for case. The court decided that the damage was consequential, and sustained the action.

In 1 Swift's Digest, 540, it is laid down, that the criterion is not whether the act was accompanied with force, or whether there was an intent to do the injury, or whether the injury was occasioned by negligence; but the question always will be, whether the injury was the direct and immediate effect of the act complained of, or whether it was merely the consequence of some act or omission.

In *Leame v. Bray*, 3 East, 593, the whole court recognized the rule laid down in *Scott v. Shepherd*, that where the injury is direct and immediate, the remedy is trespass; where it is mediate and consequential, it is case. This was said to be the rule deducible from all the authorities, ancient and modern; and Le Blanc, Justice, declared that in all the books the invariable principle to be collected is, that where the injury is immediate on the act done, then trespass lies; but where it is not immediate, but consequential, then the remedy is case.

On the whole, we are well satisfied that whatever may be the apparent discrepancy between the cases, the rule is clearly and judiciously settled, that where the injury is direct and immediate, the action must be trespass, whether the act were done willfully or

Gibbs v. Fulton.

by negligence and want of care; and as the facts set out in the declaration show that such was the character of the injury complained of in this case, the judgment of the common pleas must be affirmed.†

*GILBERT GIBBS v. JOHN A. FULTON.

[180]

Transcript from an appellate court is not proper evidence of proceedings in the court below.

THIS was an action of assumpsit, in which the plaintiff claimed to recover money paid by him as bail for the defendant. The cause was brought from the Supreme Court of Ross county.

At the trial the plaintiff, to prove the fact that he had been bail for the defendant, produced and offered in evidence a transcript of a record, duly certified from the common pleas of Chester county, Pennsylvania. This transcript contained a proceeding upon a *certiorari*, at the suit of Gilbert Gibbs v. Samuel McClean. This *certiorari* brought into the court of common pleas a transcript of a proceeding before a justice of the peace in a suit between Samuel McClean, plaintiff, and John Fulton and Gilbert Gibbs, his bail. Judgment had been rendered against Gibbs only, and this judgment upon the *certiorari* was affirmed.

When this transcript of a record was offered in evidence, the defendant objected to it as inadmissible, being but the copy of a copy. His objection was overruled, and a verdict found for the plaintiff. The defendant moved for a new trial upon the ground of error in admitting the evidence, and the decision upon the motion was adjourned.

LEONARD, in support of the motion:

The nature of the plaintiff's case is this—he claims that judgment being rendered against the defendant, before a justice of the

†NOTE BY THE EDITOR.—Case now lies for all personal injuries in which trespass at common law was a proper form of action, 42 Ohio L. 72, sec. 4. For the common law distinction between trespass and case, see vi. 144, 147; vii. 211, part 2; v. 444. When case a proper remedy, see x. 159; ix. 163, 165; xi. 372; xiv. 147; xv. 500, 659, 726.

Gibbs v. Fulton.

peace, in Pennsylvania, the plaintiff becomes bail before such justice for the payment of the money, and was compelled to pay it. This entering of bail was in the nature of a judicial proceeding before a judicial officer, of which an official written memorandum was judicially made by that officer. The evidence offered to prove the fact is not a transcript or copy of the original proceeding, but a transcript of proceedings in a different tribunal, in the nature of a writ of error, in which a copy of this proceeding was certified and acted upon. This is so distinctly and manifestly the copy of a copy, that there would seem no just ground of deliberation as to its inadmissibility.

181] *Had the *certiorari* removed the original documents or papers into the court of common pleas, instead of a transcript, the case would be wholly different. In that case the transcript certified would be in fact a copy from the original, and the original being on file in court, the clerk would be the proper officer to certify it.

BOND, for plaintiff:

The dockets of justices of the peace can not be considered records, nor are they preserved and treated as such. They are rather private papers, and left to be preserved by individuals. After a lapse of twenty years it would be impossible in many cases to trace or find them. The rules applicable to public records should not be extended or applied to them.

The writ of *certiorari* required the justice to certify his proceedings. In obeying this writ he acted officially and judicially. By his return his proceedings became matter of record in the court of common pleas. Upon a writ of error from the Supreme Court to that court, nothing would have been required but the record in that court; and it would seem clear that a record for one purpose must be a record for every purpose.

By the COURT:

The plaintiff could not recover against the defendant without proof that he became his bail. This fact he was bound to prove by the best, not by secondary evidence. The best evidence was a transcript of the proceeding against Fulton, and the undertaking, as bail, founded upon it, whether that undertaking was made by

Steele and others v. Worthington.

a recognizance signed by Gibbs, or by a judicial acknowledgment made before the justice and entered by him.

Suit was brought against Gibbs, upon this undertaking, and judgment rendered against him. To this judgment he obtained a *certiorari*, and in his return the justice embodied all his proceedings, and upon this return the judgment was affirmed. We do not perceive upon what principle a judicial return can be made where proceedings in one cause are required, embodying in it an official and judicial *return in a different cause. As to the latter, [182 if it were a judicial act, still, the original record remaining where it was first made, it should be resorted to as better and higher evidence than the transcript of it, certified into another court.

If special bail be entered in a suit in the court of common pleas, and the bail be fixed with the debt and judgment rendered against him, in a suit upon the recognizance, in the common pleas, and removed into the Supreme Court upon writ of error and affirmed, it would hardly be contended that a transcript of the record in the Supreme Court, certified by the clerk, would be proper evidence to establish the recognizance of bail. The plain course would be, to obtain from the court of common pleas transcripts of the original suit in the common pleas, and also of the suit against the bail, with the certificate of affirmance upon error from the Supreme Court. The cases are the same in principle. The evidence ought not to have been admitted, and there must be a new trial, the costs to abide the event of the suit.†

STEELE AND OTHERS v. WORTHINGTON.

Other consideration than that expressed in a deed may be given in evidence under particular circumstances, and where it does not contradict the consideration expressed.

Register of land office might legally purchase lands at public sales, under the act of Congress of May, 1800.

†NOTE BY THE EDITOR.—For justices' records, see note to case on page 16, vol. ii. When judicial records admissible as evidence, ii. 334, 348; iii. 271, 487; v. 136, 280, 283, 447, 545; vi. 251, 409; vii. 88, 212, part 1; viii. 405; ix. 108, 131; xiii. 209; xvii. 156, 365; xviii. 469.

Steele and others v. Worthington.

What terms in a will give executor full power over the testator's estate.

Where parties understand their rights, and make an agreement to adjust a question of property between them in a particular manner, a very strong case of imposition must be made out to induce a court of equity to interfere.

What is not such a case.

THIS cause was reserved for decision here by the Supreme Court in Ross county. It was a bill in equity, brought by the residuary legatees of Robert Gregg, deceased, to set aside a conveyance made by the executor under the will, upon the ground of fraud and imposition.

The bill charged that the executor of the will of R. Gregg had conveyed the land in question, one hundred acres, to the defendant, without consideration and without authority. It charged that the consideration expressed in the deed was one dollar only, and called upon the defendant to answer whether any other and what other consideration was given.

In his answer, the defendant admitted that no money consideration 183] passed, and that the sum expressed was nominal *only. He stated the real transaction to have been this: At the sales of public lands at Chillicothe, in 1801, a section and fraction of lands, of which the land in controversy was part, was purchased in the name of Robert and Nathan Gregg, upon an agreement that the defendant was to be one-half owner with them; that the first installment was in fact advanced by the defendant, and the agreement was, that each party should pay half the purchase money, and when the patent issued, Greggs should convey to Worthington half; that the section and fraction contained a large surplus, and that, after some time, it was agreed between the parties that Worthington should receive back his money advanced, and accept of the one hundred acres of land in question, as a compensation for his interest in the contract. A bond was given for the conveyance accordingly, and to take up this bond the conveyance was executed by the executor.

The facts stated in the answer were substantially made out in proof, in the progress of which it appeared in evidence, that at the time of the sale the defendant was register of the land office, and one of the persons who were required by law, and, in fact, did superintend and conduct the sale.

 Steele and others v. Worthington.

CREIGHTON and BOND, and ATKINSON, for complainants, contended :

1. That the consideration expressed was not sufficient to sustain the deed, it being made by a trustee, and that another and different consideration could not now be set up. 1 Johns. 139; 3 Johns. 506; 7 Johns. 341; 2 Sho. & Let. 500; 1 Ves. 127; 3 P. Wms. 203.

2. That the consideration set up, in this case, is illegal and void, being in contravention of the law of Congress authorizing the sales of public lands, which inhibited the register from purchasing. The contract would be void at common law, it being contrary to public policy that an agent appointed to sell should be concerned in the purchase. Sug. Vend. 391-393; 1 Com. Con. 31-37; 6 Johns. 194; 2 Johns. Ch. 254.

3. The executor was invested, *not with the title*, but with a naked power to *dispose* of the land. This disposition he *could not [184 make without good consideration. The defendant having full notice, by being a party, is affected to the whole extent. Fonb. Eq., book II., chap. 7., sec. 1, note a; Ibid., sec. 2, note c.

4. The case made in defendant's answer is one of *imposition*; and, admit that Greggs were *particeps criminis* in the fraud upon the government, yet equity would relieve in their favor, because they must be considered as the least criminal. Fonb. Eq., book II., chap. 1., sec. 1, note c; 1 Hen. & Mun. 33.

Mr. SCOTT, for the defendant, maintained :

That, in respect to the first ground taken, the consideration expressed in the deed was a good one, and sufficient to sustain the conveyance. That the other consideration alleged in the answer was also a good one, and, not being in contradiction to that expressed in the deed, was fully admissible upon the principle of the authorities cited upon the other side.

On the second point, Mr. Scott went into a minute and critical examination of the acts of Congress regulating the sale of public lands, to prove that the defendant was not by the letter or spirit prohibited from purchasing at the sale in question.

As to the third point, he contended that the executor was clothed by the will with full power over the real estate, and over all the concerns and contracts of the testator; that, therefore, the con-

Steele and others v. Worthington.

veyance was executed properly and legally, and in a faithful discharge of the trust.

The fourth point assumes, in fact, the same ground taken in the second; it is nothing if the conduct at the sale was legal.

The counsel for the complainant submitted an elaborate argument in reply, especially as to the construction of the act of Congress, the just interpretation of which, they maintained, rendered it illegal for the register to be concerned in making purchases when superintending the sales; and they enforced their former position, that such conduct was illegal upon the common principles of law and equity.

185] *Opinion of the court, by Judge BURNET:

The complainants insist, that the deed, executed to the defendant, by N. Gregg, for himself, and as executor of the last will and testament of his brother, R. Gregg, ought to be set aside on the following grounds: 1. That it was wholly without consideration. 2. That the contract between the defendant and the Greggs, for the purchase of the land from the government at the public sales, was in direct contravention of the act of Congress, and therefore fraudulent and void, and that it was also a fraud at common law. 3. That the executor was not authorized by the will to execute the deed, and that by doing so he has attempted to practice a fraud on the complainants. 4. That if the executor was authorized to convey, the answer and exhibits show such a case of imposition on the executor, that a court of equity will relieve against it.

1. It will be recollected that the consideration mentioned in the deed is one dollar. This is, *prima facie*, a good consideration, and, until it be impeached, is sufficient to sustain the deed. But the complainants have cast on it the imputation of fraud. They declare it to be fictitious, and allege that the conveyance was wholly without consideration. They have called on the defendant to answer that allegation, and to state what the real consideration was, if any existed. The answer sets out an agreement, by which the defendant and N. and R. Gregg purchased a section and fraction of land, at the public sales; that the defendant advanced the first payment; that the certificate of the purchase was taken in the name of the Greggs; that some time after the Greggs purchased out his equitable right, and gave him a title bond for one hundred acres of the land, being the land now in controversy,

and that after the death of R. Gregg, N. Gregg, in good faith, executed the deed in question, agreeably to the condition of the title bond. The proof, as far as it goes, corroborates and confirms the answer. The certificate, signed by N. and R. Gregg, establishes the equitable interest of the defendant in a moiety of the whole tract. It declares that he was jointly concerned in the purchase, and that his conduct in the whole of the transaction was correct and honorable. It also admits that the first *payment was advanced by him. 186] The deposition of William Creighton corroborates the answer, in relation to the title bond. The whole answer is responsive to the bill. It is not impeached by any part of the testimony, and as far as the want of consideration is involved, it satisfactorily rebuts the charge.

But it is alleged that the defendant has no right to avail himself of the facts disclosed by the answer, because they show a consideration different from that expressed in the deed. Why, then, it might be asked, was the defendant required to state them; and why did not the complainants rely on the evidence within their power? They seem to have taken it for granted, that the deed, *prima facie*, was good—that it was sufficient to convey the estate—and that they must fail in the object of their suit, unless they can impeach it. It was for that purpose that they called for the disclosure. If they avail themselves of it as evidence, it purges the transaction of fraud, as to the consideration. If they reject it, they stand as they were, and the deed remains unimpeached. It is believed, however, that this objection applies to deeds that have been actually impeached, and which can not be sustained without explanatory proof, and that in such cases it goes no further than to exclude evidence of a consideration, inconsistent with the one expressed; but that a party may aver another consideration, provided it be consistent with the one expressed in the deed. This seems to be the rule in Phillips' *Ev.* 424, 425, and in the cases there referred to.

If the objection should be applied to all cases in which there is charge of fraud unsupported, and extend so far as to prohibit proof of any variance between the real consideration and that expressed, much inconvenience and injustice would result, because however fair and upright the transaction might be, an omission to state the exact consideration would prove fatal to the deed.

The proposition seems to amount to this, that a variance between

Steele and others v. Worthington.

the true consideration, and that expressed, is a fraud *per se*, that can not be purged or explained by proving the truth. It sometimes happens, in an exchange of property on which no cash value [187] has been fixed by the parties, *that a nominal sum is stated in the deeds bearing no comparison with the value of the property conveyed. This is innocently done for the purpose of convenience; no person is, or can be injured by it, yet on the proposition advanced by counsel, the deeds are fraudulent; they may be avoided by the creditors or heirs of the grantors, and the grantees are without remedy.

The cases cited on this point do not sustain the complainants. The one in 7 Johns. 341, was a suit at law, brought on articles of agreement. The plaintiff offered parol proof of an agreement, not contained in the articles, in addition to the covenant expressed, which was not admitted. The court remarked, however, that if the deed were contrary to the truth, the party might have relief in equity.

The case cited from 1 Johns. 139, is of the same character. It was an action brought on a parol promise, set up as additional consideration for the conveyance of personal property, which was not mentioned in the written contract.

In the case of Clarkson v. Hanway, 2 P. Wms. 203, the grantor was a weak old man, seventy years of age. The consideration expressed in the deed was an annuity of twenty pounds, which bore no comparison with the real value of the premises. To repel the fraud, proof was offered that natural love and affection was a part of the consideration of the conveyance. The evidence was vague and contradictory, and was rejected as being incompatible with the consideration expressed.

Watt v. Grove, 2 Sch. & Lef. 500, was a case of gross and complicated fraud. The deeds set up were impeached. The chancellor remarked, "That it would be dangerous to permit an impeached deed to be supported by evidence of considerations wholly different from those alleged in it." "That the court might reform the deed when the incorrectness does not go to impeach the general fairness of the transaction." This is all the defendant asks. Having shown that the transaction was perfectly fair, that the incorrectness was of a nature not calculated to injure or deceive, and that the real consideration was altogether consistent with the one

expressed, he insists that his deed is reformed, and ought to be sustained.

2. *The second ground taken in support of the bill is, that [188 the original purchase of the land in question, at the public sales, was in contravention of the act of Congress, and contrary to the principles of the common law.

To decide on the first branch of this objection, it is necessary to examine the acts of Congress on this subject.

Section 4 of the act of 1796 directs that the land shall be offered for sale at public vendue, under the authority of *the governor, or the secretary of the Western territory, and the surveyor-general.*

By section 8, *the governor* of the territory northwest of the river Ohio is directed *to cause books to be kept, in which shall be regularly entered an account of the dates of all the sales made; the situation and number of the lots sold; the price at which each was struck off; the money deposited at the time of sale; and the dates of the certificates granted to the different purchasers.* It is made the duty of the *governor, or secretary of the said territory,* at every suspension or adjournment, for more than three days of *the sales under their direction,* to transmit to the secretary of the treasury a copy of said books certified, etc.

Section 4 of the act of May, 1800, *substitutes the register of the land office in place of the surveyor-general,* and directs the lands to be offered at public vendue, under the direction of the register of the land office, and of either the governor or secretary of the Northwestern territory. It also provides that *the superintendents* shall observe the rules and regulations of the preceding act in classing and selling fractional with entire sections, and *in keeping and transmitting accounts of the sales,* and that all lands remaining unsold at the closing of the public sales may be disposed of at private sale by the registers of the respective land offices, in the manner thereafter prescribed.

By section 7 it is made the duty of the register to *receive and enter on books, kept for that purpose only,* the applications of any person or persons who may apply for the purchase of any section or half section, and who shall pay, etc.

By section 9 it is made the duty of the registers of the land offices to transmit quarterly, to the secretary of the treasury and to the surveyor-general, an account of the several tracts applied for.

*Section 10 provides "that the registers aforesaid shall be [189

Steele and others v. Worthington.

precluded from *entering on their books any applications* for lands in their own name, and in the name of any other person in trust for them; and if any register shall wish to purchase any tract of land, he may do it by application to the surveyor-general, who shall enter the same on books to be kept for that purpose by him, who shall proceed in respect to such applications, and to any payments made for the same, in the same manner which the registers, by this act, are directed to follow in respect to applications made to them for lands by other persons." These are all the provisions that appear to have any bearing on the question; and from a careful examination of them the following conclusions seem to result:

1. That at the time the land in question was sold the register and the governor, or secretary of the territory, were constituted superintendents of the public sales.

2. That it was the *exclusive duty of the governor, as one of the superintendents, to cause books to be kept, in which should be entered an account of the proceedings at those sales.*

3. That it was made the express duty of *the governor or secretary of the territory* to transmit copies of those books to the secretary of the treasury, and that the public sales were considered as being under the particular direction of the governor or secretary, as either might attend.

4. That the surveyor-general, under the act of 1796, was not required to take any agency in keeping the sale books, or transmitting copies, and that as the register was substituted for the surveyor-general by the act of 1800, which expressly requires the superintendents to observe the same rules and regulations in *keeping and transmitting accounts* of the sales as were prescribed in the act of 1796, as follows: That the register *was not required to take any agency in keeping those books or transmitting copies.*

5. That private sales are to be effected by application to the register, who must enter the same in a book kept for that purpose only, which must therefore be distinct from the book of public sales kept by the governor, and may be denominated the register's *sale book.*

190] 6. That the only prohibition as to the registers is that **they shall not enter on their books any application for lands in their own name, or in the name of any other person for their use.*

If these inferences be correct, it must follow that the registers

are not prohibited from purchasing at the public sales, because public sales can not be made on application, and are not entered on the register's book, but on the sale book kept by the governor or secretary, and because the prohibition being confined to such sales are made on applications that must be entered on the register's book, it can not embrace public sales that are not so entered.

It also follows from these premises that the public sales are so guarded by the agency of the governor, as to render the prohibition altogether unnecessary.

The government are as well protected from imposition at the public sales, by a faithful discharge of the duties assigned to the governor, as they are at private sales, by the vigilance of the register. It would be unreasonable to extend the prohibition beyond the letter of the statute, when no beneficial object would be gained by it, either in relation to the rights of the government or of third persons. The construction set up by the complainants would effectually prevent the register from purchasing any part of the land disposed of at public sale, because the provisions made in their favor by section 10 can not be resorted to till the public sales, at which every tract must be offered, have closed, and the private sales have commenced.

If it had been the intention of Congress to prevent them from purchasing at the public sales, in the ordinary way, it is a reasonable supposition that some other way would have been provided through the agency of the governor or surveyor-general, as has been done in relation to purchasers by *application and entry*. The privilege given to the registers, of purchasing by application and entry, was intended as a substitute for the right which is taken away in the preceding part of the section; we should therefore naturally conclude that it was as broad as the prohibition. But such can not be its operation, if the prohibition be extended to purchasers at public sales, for the very obvious reason that the public sales must have closed before the register can have availed himself of the substitute.

*It is not necessary here to resort to the technical meaning of terms, or the distinction of characters, in which the defendants acted, first as superintendent of the public sales, and afterward as register of the land office; for, if the terms used in section 10 had been sufficiently comprehensive to embrace both public

Steele and others v. Worthington.

and private sales, we should not have construed their meaning or restricted their operations on that ground.

But if the register had been guilty of a manifest fraud on the government, it is a question between the parties affected by the transaction. Government might have disavowed the contract and withheld the title, or they might have waived the objection and confirmed the sale. This they have done, and it does not lie in the mouth of a third person to complain. The party on whom a fraud is practiced may take advantage of it, or waive it. If he does the latter, and confirms the contract by executing a deed, third persons can not impeach it, much less can a *particeps criminis* be suffered to do so. If any fraud was practiced in this case, it was by the Greggs, who purchased the property in their names, for the joint benefit of themselves and the register. They were the persons who consummated the fraud, and to say the least of them, they were in *pari delicto* with the register. The objection, therefore, extends further than counsel would willingly follow it. If the statute contains such a prohibition as renders a purchase, made in the name of another, for the benefit of the register, a fraud on the government, such a purchase is not only void as to the register, but as to all others concerned with him. The act can not be purged by excluding the register. If fraud existed, the Greggs participated in it, and must be equally affected by it. The objection goes to the whole purchase, and taints it throughout. The same principle that would justify the court in deciding against the defendants, would restrain them from decreeing in favor of the complainants. In all such cases equity refuses to interfere in behalf of either, and as the complainants claim in the character of devisees of R. Gregg, they stand in his shoes.

In regard to the second branch of this objection, it may be re-
192] marked that it is not necessary to resort to the common law to determine the legality of this purchase. The powers and disabilities, the privileges and prohibitions of the register are regulated by the statute, and are to be decided by it. Congress having prohibited him from purchasing at private sales, by application in his own office, without including in the prohibition the right of purchasing at the public sales, the natural inference is that they intended to permit the latter. By including in the prohibition only one of the modes of purchase, they have virtually excluded from it the

other, thereby clearly indicating it to be their intention not to prevent him from purchasing at the public sales.

But waiving this inference from the statute, the authorities cited to show that the consideration is bad, and the sale void at common law, are not applicable to the case as between these parties.

The general doctrine in Sug. Law Vend., chap. 14, sec. 2, is that trustees, agents, etc., are not permitted to purchase the property to which their trust extends, except under certain restrictions; but as such purchases are merely *mala prohibita*, not *mala in se*, they admit of confirmation by the injured party, who alone can take advantage of them; and if the *cestui que trust* acquiesces for a long time, equity will not assist him to set aside the sale.

In this case, the *cestui que trust* has not only acquiesced more than twenty-five years, but has literally confirmed the sale. He is still satisfied with it, and the only complaint we hear is from third persons, who occupy the place of a *particeps criminis*. The doctrine is well established that the remedy for a breach of trust is exclusively with the party injured. The *cestui que trust* may apply for a new sale, or may confirm the former sale; and if the purchaser (the trustee) has sold at an advance, he may claim the excess.

In *Davoue v. Tanning*, 2 Johns. Ch. 252, the principle is clearly expressed that none but the party injured can question the validity of the sale. In that case, Chancellor Kent ordered the lot to be set up again and resold for the benefit of the *cestui que trust*, provided it would sell for more than the amount of the former sale, together with the sum expended in improvements and interest; but if it would not sell for more than that amount, that the first sale should be confirmed.

*In *Doolin v. Ward*, cited from 6 Johns. 194, the claim of [193 the plaintiff rested on a verbal promise that if the plaintiff would not bid against him at a public sale, he (the defendant) would purchase the articles, and divide them with the plaintiff. No consideration passed, nor was there anything obligatory on either party.

But if, as in the case before us, the plaintiff had paid the first installment of the purchase money, and the defendant having availed himself of that payment, had afterward given his obligation to the plaintiffs to deliver him a part of the articles, there would have been some resemblance between the cases, and the decision would probably have been very different.

Steele and others v. Worthington.

3. The third ground is that the executor was not authorized to make the conveyance, and that in doing it he has attempted a fraud on complainant. From the phraseology of the objection, it might be considered as confined to the simple act of the execution and delivery of the deed; but as it is generally true that the greater power involves the less, the objection was, no doubt, intended to extend as well to the power of negotiating the contract, as to the right of consummating it by passing the title.

This branch of the case necessarily leads to the examination of the will of R. Gregg. After appointing his brother, N. Gregg, sole executor, the testator goes on to say, "I do invest him with full, ample, and complete power to dispose (after my decease), in such manner as he thinks proper, all my estate of every description, real and personal, and invest him with full power to settle and adjust all my worldly affairs, as he pleases; meaning expressly to invest him with as full power to that effect as I might possess, not incompatible with the tenor and substance of this last will and testament." It appears to me that language could not easily be selected better calculated to express the power claimed by the executor than that which the testator has adopted. The epithets are strong and comprehensive; the power to dispose, and the manner of doing it, are limited only by the discretion of the executor, and it is extended to the whole estate, real and personal. He is also to settle and adjust all his worldly affairs as he pleases, 194] and to prevent *cavil, and as if to make certainty more certain, he declares it to be his express intention to vest in his executor the same power that he himself then possessed.

The unavoidable conclusion is, that the executor has power to sell the estate, and to settle and adjust all claims against it.

The executor being clothed with this power, the defendant presented the title bond, executed by the testator and himself. Being fully satisfied with the justice of the demand, he was bound in the faithful discharge of the trust to settle it by conveying the land, and taking up the bond.

4. The last ground taken by the complainants is, that if the executor was authorized to sell and convey, yet the answer and exhibits show it to be such a case of imposition that equity ought to relieve. The complainants undertake to maintain this ground by taking it for granted that the claim was against law, and without consideration. The first part of this hypothesis has been dis-

Steele and others v. Worthington.

posed of already, and it is only necessary to look into the answer and exhibits to ascertain that no part of it is supported by the facts. The defendant, as appears from the certificate of the Greggs, as well as from the answer, had an equitable right to the undivided moiety of a section and fraction of land in the vicinity of Chilli-cothe, purchased in the name of the Greggs at the public sales. It was ascertained that there was a large surplus in the tract—the defendant had advanced the first payment—the claim had been held in common upward of a year—the country was increasing at that time in population with unexampled rapidity, and although the land in the first instance might have been purchased at a fair price, it must have risen greatly in value during the period that the parties held it as a joint property.

This being the state of the case, an agreement was made between the parties by which the defendant was to relinquish his claim to the entire tract. The Greggs were to refund the money advanced by defendant, and convey to him, when the patent should be procured, one hundred acres on the side of the tract adjoining his other lands. The money was refunded, and a title bond given for the one hundred acres. From these facts it would seem that *the consideration was abundantly sufficient to support the [195 contract, and that the advantage to the parties must have been about equal; but whether this was so or not, they were all men of prudence, equally acquainted with the situation and nature of the property, and of their respective rights in it. There was no misrepresentation or concealment of the truth. N. and R. Gregg must have supposed they were making a good bargain; there is no evidence to show they were not, and they seem to have been contented. With the exception of Mrs. McClean's deposition, which, to say the least of it, is accompanied with very suspicious circumstances, there is no evidence that they at any time complained of their bargain, or wished to rescind it. But if that deposition be taken as true, the presumption is that the objection of R. Gregg, of which she speaks, was an after thought, originating, not from a belief that he had made a bad bargain, but from a hope that he might oust the defendant of all right, on the supposition that he could not become a purchaser at the public sales. On no other ground can the objection be reconciled with the certificate he previously gave in conjunction with his brother. But be this as it may, the contract appears to be fair, equal, and equitable.

Steele and others v. Worthington.

The suspicions cast on it by the bill are very naturally explained, and fully obviated by the answer, which is responsive, and is not contradicted but corroborated by the testimony. It is not the province of equity to weigh the mutual considerations leading to a contract with great exactness, in order to ascertain if there be not some grains of difference, nor does it ordinarily limit the power, or control the discretion of the contracting parties, who are treated as free agents and left to the exercise of their own judgments. Whenever equity does interfere with a contract, or refuse its aid to carry it into execution for inadequacy of consideration, it is on the ground of fraud, which must either be clearly proved, or result irresistibly at the first view, and without calculation from the grossness of the disparity.

The complainants do not present such a case. The most natural inference to be drawn from every thing disclosed, is that the disparity, if there be any, was in favor of the *Greggs. It was contended by the complainants' counsel, that the defendant, by his certificate to N. and R. Gregg, that they were the purchasers of the land, was estopped from setting up a claim to any part of it. I do not see how such a consequence can result from that certificate as it contains nothing inconsistent with the existence of a trust. It frequently happens, for convenience, that one joint purchaser takes the title in his own name, at the request or on the express order of the other purchasers. Sometimes land is conveyed to an agent by an absolute deed, as the most convenient way of effecting a sale, but such a deed would not estop the owner from showing the trust and claiming the purchase money. The certificate in this case was *prima facie* evidence that the right was exclusively vested in the Greggs, but that inference was not inconsistent with the existence of a trust. A grantor is sometimes estopped by his own deed, but it must be in relation to a matter wholly incompatible with it; as, if a person holding an equitable title should sell and convey by deed in fee, with covenants of seizin and warranty, and should afterward obtain a legal title in his own name, his deed would inure to the benefit of his grantee, and he would be estopped by his covenants from setting up title in himself which would falsify those covenants and be wholly incompatible with them; for, if the covenants be true, the legal title passed by the deed. In this case the certificate of the defendant was compatible with an agreement, that when the patent should

Steele and others v. Worthington.

be obtained in the name of the Greggs they should convey a moiety or any other portion of the land to the defendant.

But, independent of all other considerations, if the facts set up by the complainants be true, and the legal inferences they draw from them be correct, they have a complete remedy at law. An examination of the case, as they present it, will show that on the death of their ancestor the legal title vested in them; that the defendant never had an equitable right to any part of the land; that the executor had no right to convey, and that the deed to the defendant was fraudulent and void. On that state of the case, which is the ground on which they have placed themselves, they have no necessity for the aid of chancery.

*Again, as it has been decided that the acts of Congress do [197 not prohibit the register from purchasing at the public sales, it follows that he had an equitable right to an undivided moiety of the whole tract, and that if the contract on which the title-bond was given be not valid that right has not been extinguished. And, as it is a rule that he who asks equity must do equity, it would seem that if the complainants could get rid of that contract they would thereby establish the defendant's right to the undivided moiety; consequently a decree for a reconveyance of the one hundred acres would be on the condition that they conveyed to the defendant his undivided interest in the entire tract on equitable terms.

The bill must be dismissed at the cost of the complainants.

†NOTE BY THE EDITOR.—When a consideration of a kind different from that expressed in a deed may be proved, see Wright, 755; v. 121; xvi. 438, and cases cited in the last case.

For late decisions touching relief in equity, in cases of mistake of law and fact, see xi. 223; xv. 152; xvi. 490; xviii. 116. Equity will not correct a mistake in the deed of a married woman, xvii. 105, and cases cited. But see 47 Ohio L. 53.

McFeely v. Vantyle.

McFEELY v. VANTYLE.

Title defectively set out in a declaration, and the plea states the fact omitted, judgment after verdict ought not to be arrested.

THIS case was adjourned from the Supreme Court of Hamilton county, upon a motion in arrest of judgment. The case was as follows :

The first count in the declaration sets out a contract, in which the defendant covenanted to convey to the plaintiffs the half of a mill seat, with a part of the defendant's plantation necessary for said seat, etc. The part to be conveyed is described by metes and bounds, and was to contain five acres at least, or as much as the parties should deem necessary for a mill. One of the lines called for is to run up the creek, through the bottom, as the parties might agree, to the line of Lawrence's land. It is averred, that the defendant agreed to make the plaintiffs a good and sufficient deed for the premises, on the payment of three hundred dollars, and that that sum was fully paid. The breach is, that the defendant did not make a good and sufficient deed, etc.

The second count sets out the contract substantially as the first does, but avers payment of a part of the consideration money and a tender and refusal of the residue.

198] *The first plea takes issue on the payment and tender. The second plea alleges that the plaintiffs ought not to sustain their action because the defendant was ready to make and execute to the plaintiffs a good and sufficient deed, whenever they would agree with him as to the line, and pay agreeably to the form and effect of the indenture, and tenders an issue.

A verdict was found for the plaintiffs on both issues, and a motion for a new trial overruled.

The defendant then filed the following reasons in arrest of judgment:

1. "That there is no averment that the parties agreed on the land to be conveyed, or any proof of what land was agreed on, although the covenant states the same and makes such an agreement necessary."

2. "No offer to submit to arbitration; no proof that plaintiffs

McFeely v. Vantyle.

made any offer, although it is proved to be a part of their bargain, and not contradicted."

3. "That there is no such covenant as that set out in the declaration, viz: that a deed should be made unconditionally."

4. "No averment of a demand of a deed."

5. "It is set forth that the land should be so much as the parties might agree on—no agreement averred."

GAZLAY, in support of the motion :

By the covenant, defendant agrees to convey to plaintiffs, as tenants in common, a moiety of a mill seat, and such quantity of land being part of his (defendant's) plantation, as they, the defendant and plaintiff, should deem necessary for a mill seat, mill yard, and building for a miller and his family. The words of covenant are, "containing five acres at least, or so much as parties (defendant and plaintiff), might deem necessary," etc. The covenant contains a description of the property, by courses and distances, in which one line is left open, subject to future agreement as to quantity, as above specified. The consideration for five acres, if that quantity should be agreed on, is three hundred dollars; if more than five acres, the surplus to be paid for at forty dollars per acre. The covenants are mutual and dependent, and declared on as such.

*The declaration sets out the terms of the covenant truly, [199 excepting that part of same which provides for the payment of the overplus, if more than five acres should be required. As to this it is silent. The breaches assigned are general, as if the covenant barely obliged the defendant to convey on the payment of a sum of money specified. In other words, they relate to the whole covenant on the part of the defendant; that he did not convey as he had agreed to do. It is a rule of pleading, that the whole of the consideration on both sides must be set out; every matter of substance must be specified. 1 Chitty Pl. 116, cases cited, *Bristow v. Wright*. And in mutual and dependent covenants, plaintiff must aver, not only a performance of his, but the consideration of defendant's covenants. Doug. 690; 1 Saund. 320, note a.

It is not averred that the quantity of land was agreed on, although this is a substantive part of the agreement. It is the covenant of plaintiffs as well as of the defendant, and made for their mutual interest and benefit, as tenants in common. If it be not so considered, the defendant or plaintiffs may be deprived of

McFeely v. Vantyle.

rights, the securing of which was the principal inducement to making the covenant.

It is the contract of the parties, that the quantity of land shall be determined by them for their mutual convenience; and this determination as to quantity was an act to precede any and every other in completing the terms of the covenant. It is not from one, but every part of the covenant, that this position is deducible; first in the introduction, then in the courses and distance, and again in providing for the payment of the overplus. The omission to aver that parties came to such agreement as to the quantity of land to be conveyed, must be fatal. Nor is the quantity to be conveyed to be considered at all in the nature of a condition which the plaintiff is at liberty to omit, and which may be pleaded to enlarge or defeat the effect of the covenant; as where the defendant was bound to deliver fifteen hundred measures of saltpeter, provided any accident by fire or water did not prevent. 1 Term, 540; 1 Saund. 234, note; Esp. N. P. 330, on cov. title.

200] That which may happen to defeat the action does *not necessarily belong to the plaintiff to state, and lying properly within the knowledge of defendant, and being for his benefit, must come from him. Hence the fixing on the quantity was to be the act of both parties, for the benefit of both, and was necessarily to precede a conveyance; it was the first step to be taken on the contract.

Penny v. Porter, 2 East, 2, court say, agreement laid as certain, where it is conditional, variance fatal.

Clark v. Gray, 6 East, 570, court say, the certain act to be done must be averred.

Here the covenant itself is set forth in the declaration, but there is no averment that the joint act of the parties which was to give it effect was ever performed. 1 Chitty Pl. 313, and cases cited.

The error is still more apparent in the breach, which is that defendant has not conveyed as he agreed to do. How did he agree to convey, and what did he agree to convey? Such quantity as should be agreed on. If the declaration were for five acres only, then the breach ought to have been so stated—if for a greater quantity, or a less, that should have been stated. As the declaration now stands, it would appear plaintiffs claimed five acres only; yet

McFeely v. Vantyle.

the breach is to the whole covenant, and that may be more than five acres. *Tredwell v. Steel*, 3 Caine's N. Y. 169; *Maston v. Hobbs*, 2 Mass. 437.

Covenant for one of two quantities, breach should have been in alternative. 1 Esp. N. P. 301.

No counsel argued on the other side.

Opinion of the court, by Judge BURNET:

The second, third, and fourth reasons do not require to be particularly notice. They either relate to matters not presented by the pleadings, or to such as should have been noticed at an earlier stage of the proceeding, and in a different form. The first and fifth reasons assign the omission of an avowment, that the line, and the quantity of land to be conveyed, had been agreed on by the parties. These objections resolve themselves into one; for as the course and distance of all the lines are given, except one, which is *to terminate at Lawrence's line, it follows, that fixing the [201 course of that line must settle the quantity of land to be conveyed; but a reference to the record will show that the defendant has supplied the omission by his second plea, which puts that matter distinctly, though informally, in issue, and as that issue was found for the plaintiffs, the fact must have been proved to the satisfaction of the jury.

The contract is drawn with a want of technical precision, though the meaning of the parties can be sufficiently ascertained. The pleadings are informal throughout, as well on the part of the defendant, as of the plaintiff. The title set out in the declaration appears to be a good one, but it is defectively stated. The substance of the contract is given correctly. The difficulty arises from the want of proper averments in the declaration. The defendant might have demurred, but he did not see proper to take that course. He chose rather to supply the defect, and rest on the evidence. After having traversed the payment and tender, he has informally put the agreement, as to the line, in issue; the whole of that subject was therefore before the jury. It is true that the defendant could not convey till it was ascertained what he was bound to convey; but it is equally true, that the second issue could not have been found for plaintiff, unless that matter had been as-

Vancleve v. Wilson.

certained by the evidence at the trial. The defect, therefore, was supplied by the plea, or cured by the verdict. Whatever might have been the result of a demurrer, we do not feel at liberty, under existing circumstances, to arrest the judgment.†

2021

*WILLIAM VANCLEVE v. RALPH WILSON.

In cases certified to court of common pleas, upon attachment from justices of the peace, the jurisdiction of common pleas is original, not appellate.

THIS case was commenced by attachment before a justice of the peace, for the sum of sixty-four dollars and ninety-one cents. A garnishee was summoned, in whose hands eleven dollars and thirty-one and a half cents were secured. Afterward, an affidavit was made, and the justice issued an attachment against lands and tenements. The officer returned a levy upon lands, and the justice certified his proceedings, with the return of the officer, to the court of common pleas. The defendant appeared in the court of common pleas, and entered bail, pleaded to the action, and went to trial. The jury gave a verdict of fifty-six dollars for the plaintiff, and the defendant appealed to the Supreme Court of Montgomery county, where the proceedings were all had. The plaintiff moved to quash the appeal, and the decision of the motion was adjourned to this court.

MUNGER and FALES, in support of the motion :

22 Ohio Laws, sec. 99, p. 72. In civil cases, an appeal shall be allowed of course, to the Supreme Court, from any judgment or decree rendered in the court of common pleas, in which such court had original jurisdiction. Id., p. 50, sec. 2. Supreme Court shall have appellate jurisdiction from the court of common pleas in all cases in which the court of common pleas has original jurisdiction.

Id., p. 50, sec. 4. Courts of common pleas shall have original jurisdiction in all civil cases, both in law and equity, where the

† NOTE BY THE EDITOR.—See also ii. 204; xiv. 127; xv. 138.

Vancleve v. Wilson.

sum or matter in dispute exceeds the jurisdiction of justices of the peace, and appellate jurisdiction from the decision of the justices of the peace in their respective counties, in all cases.

The amount claimed and proved did not exceed the jurisdiction of justices of the peace.

The Supreme Court, therefore, could not have appellate jurisdiction by virtue of the foregoing section defining its appellate powers.

Neither does the law regulating attachments give the Supreme Court appellate jurisdiction in this case.

*It is a well-settled principle, that when jurisdiction is [203 given to a court, the presumption is that it was intended by the legislature to be final, unless that presumption is repelled by some provision of law. There is no such provision of law.

In 22 Ohio laws, 157, section 22, it is provided, when the justice certifies his proceedings to the court of common pleas, that there shall be had thereon the same proceedings as in other cases of attachment, sued out originally from the court of common pleas.

The legislature could not have intended, by this, to give an appeal to the Supreme Court, but to give the court of common pleas full power, in the suits thus brought before them, to enable them to order sale of property, etc., in the same manner as if the suit had been originated in the court of common pleas.

STODDARD, for defendant, submitted no argument.

By the Court:

Section 17 of the act regulating attachments before justices of the peace, passed in 1816, under which these proceedings were had, gives jurisdiction of the cause to the court of common pleas. This jurisdiction can not be appellate, for nothing is appealed from; no judgment is rendered to be revised, and the cause does not come into the court of common pleas by any act of either party, but in consequence of a legal duty imposed upon the justice. The proceedings in the court of common pleas, in taking bail, filing declaration, and other proceedings, and in the trial of the cause, are all essentially of the original character. The jurisdiction, therefore, must be original, and the motion to quash the appeal is overruled.†

†NOTE BY THE EDITOR.—See note to the case on page 28, *il*.

Maxfield v. Johnston.

204] *EBER MAXFIELD v. CHARLES AND ADAMSON JOHNSTON.

Count in *assumpsit* upon a receipt for money is good after verdict, although it omits to allege that the money was received for plaintiff's use.

THIS case was adjourned from the county of Portage, upon a motion made by the defendants in arrest of judgment.

It was an action of *assumpsit*. The declaration contained two counts—the first was as follows :

"For that whereas, the said Charles and Adamson heretofore, to wit, of August 21, 1818, at Nelson, in said county of Portage, made their certain memorandum in writing, commonly called a receipt, bearing date on the day and year aforesaid, their own proper hands and names being thereto subscribed, and then and there delivered said memorandum, or receipt, to the plaintiff, and thereby then and there acknowledged to have received on that day, of the said plaintiff, two hundred dollars. By means whereof the said Charles and Adamson then and there became liable to pay to said plaintiff the said sum of money, in said receipt specified, according to the tenor and effect thereof; and being so liable," etc., charging the assumption and consideration in the usual form.

Second count, for four hundred dollars, for work and labor; four hundred for wares and merchandise, money lent, received, and advanced in the common form.

The jury found a general verdict for the plaintiff. The defendants moved in arrest of judgment, and assigned the following reasons :

The verdict is general upon all the counts in the declaration, and the first count therein is insufficient in law to authorize the court to render judgment in this: that it is not alleged in said count that the said sum of money, therein mentioned, was had and received, or otherwise possessed by defendant, to the use or on account of the plaintiff, or other than for the defendant's own use.

WRIGHT, in support of the motion :

Where there are several counts in a civil suit, and one bad, and a general verdict, judgment must be arrested. 1 Ch. Pl. 288, and notes.

Maxfield v. Johnston.

*The receipt of money by one person of another raises no [205 implied assumpsit to pay, nor does a *voluntary* payment of money. A liability is raised upon a receipt to the use of plaintiff. In all cases of receipts the title arises from the *use*, and the moral obligation flowing from it to pay. 1 Ch. Pl. 89, and note; 4 Johns. 240; 1 Esp. Dig. 119.

By the custom or law of merchants, the statute of Anne, and the statutes of Ohio, actions of assumpsit may be maintained upon *promissory notes*, upon the *principle* that the *promise* and the acknowledgment of *value received* is a sufficient consideration for the assumpsit. It is supposed a *promise* on paper, *without the value received*, would be a *nud. pact.* This has not been extended to receipts where they are *declared on*, unless they contain a promise to pay on account, or some acknowledgment showing in the plaintiff a *subsisting interest.* See form in Chit. on Bills, 530.

It is not denied that the receipt would be evidence under the common count for money received to the *use* of plaintiff, from which they might *deduce* the use from the fact of the receipt, and if they found it the verdict would be good; but that is not the case of *defective title.*

It is a well-settled rule that the allegations are always to be construed strictly against the party pleading.

SLOANE and NEWTON, in reply:

The foundation of this motion is the insufficiency of the first count in the plaintiff's declaration, for the reason that the plaintiff has not set forth a good title or cause of action. This count describes a receipt, or memorandum in writing, concluding in the usual form, with an averment of a legal liability and an undertaking and promise to pay on the part of the defendant, and only wants an averment that the money therein mentioned was received by the defendant *to the plaintiff's use*, in order to make the plaintiff's title perfect. Whatever might have been the effect of the omission of this averment on demurrer, still it is aided by a *verdict* at common law; for, after verdict, every promise in a declaration is taken to be an *express promise.* Lawes on Plead. in Assumpsit, 76, n. 1, and 345, n. 1; Marine Insurance Co. v. *Young, 1 [206 Cranch, 332; Beecker v. Beecker, 7 Johns. 103.

Then, as the case now stands before the court on this motion, there is an acknowledgment of the receipt of the money, and an

Maxfield v. Johnston.

express promise to pay it on the part of the defendant, which certainly constitutes a good cause of action.

Again, it is a general rule of law *that a verdict will aid a title defectively set out, but not a defective title*; and from an examination of the authorities and decisions had under this rule, it is evident that the present case falls under the former description of title. The distinction between a *defective title* and a *title defectively set out*, as supported by the current of authorities, is thus defined in the books: "If the promise do not appear to be warranted by the consideration stated, or it can not be collected from the record what contract was meant to be stated, or the contract stated appear to be such upon which an action of assumpsit will not lie, the defendant may take advantage of the objection by demurrer, or motion in arrest of judgment, or writ of error, even after verdict; *but where it may be collected from the record what special contract was meant to be stated*, any defect or uncertainty in the statement on the record may, after verdict, be supplied by intending it to have been proved before the jury." Lawes on Pleading in Assumpsit, 118, 119, and cases there cited. Also, where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict by common law. 1 Saund. 228, n. 1, and 28, n. 4; 1 Chitty Pl. 402, and notes, and 332, and notes; Tidd's Prac. 826, and cases cited; 2 Bos. & Pul. 259, 267, 268.

When it is to be collected from the record what special contract was meant to be stated, any defect or omission, whether of form or 207] substance, in the statement or the record, may be supplied by intending proof before the jury. Indeed the court will infer almost anything after verdict. Ward v. Harris, 2 Bos. & Pul. 267, 268, and Da Costa v. Clark, 2 Bos. & Pul. 259; 1 Chitty Pl. 402, and notes; 1 Saund. 228, n. 1, and cases there collected; 5 East, 270; 11 Johns. 141; 12 Johns. 353; 15 Johns. 250.

At common law, when anything is omitted in the declaration, *though it be matter of substance*, if it be such as that, without proving it at the trial, the plaintiff could not have had a verdict, and there

Maxfield v. Johnston.

be a verdict for the plaintiff, such omission shall not arrest the judgment. Tidd's Prac. 826, and cases there cited.

Now, in the present case, there has been a trial on the merits, and a verdict for the plaintiff, and the only defect or omission in the plaintiff's declaration, necessary to make a good and perfect title, is the want of averment (assigned by the defendant's counsel as the grounds of this motion), that the money was received by the defendant to the *plaintiff's use*; but, from the state of the pleadings, *this fact* must, of necessity, have been proved upon the trial, *otherwise the court could not have directed the jury to give, and the jury could not have given, a verdict for the plaintiff.*

Furthermore, enough is stated in the declaration to say what contract was meant to be stated. Indeed the terms of the declaration are so plain and obvious that the court can not mistake it.

If, then, it be a fair presumption, that the fact omitted in the declaration was proved upon the trial, and it may be collected from the record what special contract was meant to be stated, the judgment ought not to be arrested.

The rule mentioned by the defendant's counsel in argument, "That allegations are always to be construed the strongest against the party pleading," is true before verdict, but after verdict they shall be so construed as to support the verdict. 2 Bos. & Pul. 259.

Opinion of the court, by Judge HITCHCOCK:

The declaration in the present case contains several counts, and for a supposed defect in the first, it is moved to arrest the judgment. Where there is a general verdict for *the plaintiff* [208] upon a declaration containing several counts, and one of the counts is defective, the judgment will be arrested. It is not, however, for every defect that such consequences shall follow. Mere formal defects are cured by verdict. Such defects, too, as arise from the manner in which the title of the plaintiff is set forth, are cured by the verdict, provided sufficient appears to satisfy the court that the plaintiff had good cause of action. If, however, it appears that the plaintiff has no cause of action, or, in other words, that the title itself upon which he claims to recover is defective, such defect is not cured by verdict. After a jury have passed upon a case, everything is to be presumed which consistently can be presumed to sustain their verdict.

The first count of the plaintiff's declaration sets out that defend-

Litler v. Horsey.

ants received of the plaintiff a specific sum of money which they promised to pay, etc. It is defective in this particular, that it does not state that the money was received to the plaintiff's use. Had the declaration contained but a single count for money had and received by the defendants, to the use of the plaintiff, the receipt which is referred to in the present case would have been good evidence under such declaration to authorize the plaintiff to recover. It is manifest, then, that the count objected to sets out a good title, although it is done defectively. After verdict the court must presume that it was proven on the trial that the money was received to the use of the plaintiff, otherwise the jury would not have found as they have done. The omission to state that the money was received to the use of the plaintiff is cured by the verdict. Whatever might have been the opinion of the court upon a demurrer to the declaration, it is now too late to take exception to it.

If the receipt of the money had been accompanied with an express promise to pay, it would have been equivalent to a promissory note. The consideration would have been sufficient to support the promise. After verdict every promise laid in the declaration is to be considered as an express promise. It is too late to say that it is no other promise than such as is implied in law. This 209] case, then, is *presented to the court as it would have been had there been an express promise to pay. Such promise would have been sufficient consideration to support it, and would be obligatory on the party. For this reason, therefore, the judgment can not be arrested.

Let judgment be entered for the plaintiff.

ELISHA LITLER v. STEPHEN HORSEY.

One of several sureties, against whom judgment has been obtained, can not sustain a separate action against principal, under section 5 of the act for the relief of sureties. But in such case, where there is a joint judgment against several sureties, all must join in the action.

THIS was a writ of error to a judgment of the court of common pleas of Pickaway county, reserved in the Supreme Court of that

Litler v. Horsey.

county for decision here. The original action was a special assumpsit, and the facts, upon which the opinion of the court was founded, were as follows :

On April 21, 1818, Litler, the defendant, and one Heath made a note for twenty-two hundred dollars, negotiable at the office of the Bank of the United States at Chillicothe. It was indorsed by the plaintiff, Horsey, John White, and James Moore, and discounted, and the proceeds received by the drawers. This discount was an accommodation for the drawers, and the note drawn and indorsed by the same parties, was renewed until October 27, 1818, when Asael Heath's note, indorsed by the plaintiff, John White, James Moore, the previous indorsers, and Job Radcliffe, an additional indorser, was discounted, and the proceeds applied to take up the note of Litler and Heath. Litler's name was thus withdrawn from the paper, and the note was renewed and reduced by the same parties until June 1, 1819, when Asael Heath's note was discounted, indorsed by the plaintiff, and by James Moore, Job Radcliffe, and Jonathan Heath, instead of John White. The note thus indorsed was renewed once, and not being paid, suit was brought against the plaintiff and the other indorsers, and judgment rendered against them. Horsey had not paid the money; and it was agreed that there was no proof that Horsey indorsed the first note at the request of Litler, other than the presumption arising from the fact, that Litler *was one of the drawers of the notes; [210 and there was no proof that Litler had any information or knowledge that Horsey had indorsed the note in question.

These facts appeared upon the pleadings, and upon a bill of exceptions, made part of the record. The jury found a verdict for the plaintiff, and judgment was given upon the verdict, to reverse which the writ of error was brought.

IRWIN, for plaintiff in error :

Horsey, not having paid the money as surety, predicates his action upon the statute for the relief of sureties, which gives the surety an action against the principal, where judgment has been rendered against such surety for the debt.

The action was not maintainable, because Litler was not a party to the note on which judgment was rendered; because, there being more than one surety, they ought all to have joined as plaintiffs in the action; and because the note upon which judgment was ren-

Litler v. Horsey.

dered, was a transaction between parties with whom Litler never was associated in the negotiation.

The first section of the act confines the relief to cases of sureties "by bond, bill, or note." The fifth section, which gives the action to a surety before payment of the money, must be understood to relate to the class of cases included in the first, and to none other. Litler being no party to the note, no judgment upon it could be rendered against him; he could not, therefore, be subjected to an action under the fifth section.

If he were subject to such action, under this section, it is to a single action only, and not to as many actions as there may be sureties. This would be to multiply litigation, when the legislature have evinced their disapprobation, by requiring suits against drawers and indorsers to be joined.

The note drawn by Heath and Litler was paid and satisfied. New transactions took place, to which Litler was no party, and it can not be possible that Jonathan Heath and Job Radcliffe, whose names were never on the note with Litler, can be his security in a 211] "bond, bill, or note." Yet *they, with the plaintiff, are joint securities upon that note, and their responsibilities must be the same.

EWING, for defendant in error:

This court have decided, that indorsees of accommodation paper are joint sureties for the drawers. *Douglas v. Waddle*, 1 Ohio, 413.

Sureties can not join in an action against their principal. They must sever.

The statute gives a new and summary remedy, but it does not change the law as to parties to the action, or make their remedy joint where before it was several.

If sureties, whether indorsees or joint obligees, pay the debt of their principal, they can not sue him jointly, to recover back their money. The suits must be several. It may be considered a hardship to subject the principal to a suit by each of his sureties. This might be urged as a reason why the legislature should change the law, and provide for a joint action. But without such interference a joint suit can not be sustained.

The original debt was contracted for the joint benefit of Litler and Heath; they were the original debtors, and the same debt

Litler v. Horsey.

subsisted through all the mutations of renewing notes and changing securities. Litler is, therefore, "a principal debtor" within the meaning of the act, and is liable.

By the Court :

At the common law a surety has no action against his principal until such surety has paid the money; and the remedy extends no further than to recover back the amount paid, as in any other case of money paid for the defendant, at his request. This being the rule, the action of every surety must be for his own advances, and must be in its nature separate. For although two or more joined as sureties in the writing, that act gave them no right, even if it could be considered a joint act. Each surety could recover the amount he had paid, and no more, and the principal, though subjected to the expense of separate suits, could not be subjected to a judgment for any greater sum than his own original debt.

*Our statute gives to the surety a totally different remedy. [212 It authorizes the surety to sue a severe process, and obtain a summary judgment against his principal, so soon as the creditor shall have obtained judgment against the surety. The judgment is to be rendered for the "*proper amount*," which, of course, must be the amount of the judgment against the security. The foundation of this proceeding in favor of the surety is totally different in principle from the proceeding at common law. It is not the amount paid by the surety, but the whole amount of the judgment, for which the surety may proceed against the principal. Where there are, as in this case, four sureties, upon the doctrine contended for by the defendant in error, each is entitled to a separate judgment against the principal for the whole amount. And each, upon the hypothesis that *he* might be compelled to pay, would claim to proceed and collect the whole amount of his judgment. Thus a necessity might be created for more litigation to settle and adjust all the rights of the parties. The court conceive that this would not be a reasonable construction of the statute. The judgment which gives the right of the surety to sue, is an entire and single judgment against all; the right it confers upon them must also be entire. Such being the opinion of the court, it is unnecessary to inquire whether the plaintiff could, upon the facts stated, be considered a surety for the defendant. Were that fact fully admitted he could not, in this case, sustain his separate action. The judgment must be reversed.

Lessee of Atkinson v. Dailey.

LESSEE OF ATKINSON v. DAILEY.

Lease for school lands is not valid unless acknowledged by the grantors before a judge or justice.

At the trial of this cause, which was an ejectment, in the Supreme Court of Monroe county, the plaintiff offered in evidence a lease executed by William Kent and Robert Carpenter, trustees of the original surveyed township, No. 7, in range 7, Monroe county, for section sixteen, in said township, the premises in dispute to his lessor. The execution of this lease was attested by three witnesses, one of whom was the township clerk. It was not 213] acknowledged *before any judge or justice, but was recorded. The defendant objected to the lease being given in evidence; the objection was sustained, and the plaintiff became nonsuit.

A motion was made to set aside the nonsuit, and award a new trial, on the ground that the court mistook the law in rejecting the lease. The decision of this motion was adjourned to this court.

BEEBE, for plaintiff.

STOKLEY, for defendant.

By the COURT:

The lease offered in evidence in this case and rejected, is dated December 28, 1822, and appears to have been recorded January 8, 1825. It was made under the provision of the act to provide for leasing certain school lands therein mentioned, passed January 27, 1817. Vol. 15, p. 202. This act is silent as to the mode of executing leases; but the third section requires that leases executed under the law shall, "*in all cases, be recorded by the clerk of the township, and also by the recorder of the county, at the proper costs and charges of the lessee or lessees.*"

As the act providing for making these leases prescribes no particular mode of executing them, the court are of opinion that they can only be valid when executed conformably to the general law. By the act of February 24, 1820, vol. 22, p. 219, it is distinctly required, that in addition to being signed and sealed in the presence

Vance v. Bank of Columbus.

of witnesses, deeds, for the conveyance of lands, shall be acknowledged before a judge of the court of common pleas, or a justice of the peace. This provision extends not only to deeds, but to "*other instruments of writing, by which any land, tenements, or hereditaments shall be conveyed in whole or in part, or otherwise affected, or incumbered in law.*" The lease in question has not been thus acknowledged; it has not, therefore, been executed agreeably to law, and can not invest the lessor of the plaintiff with title. It was properly rejected, and the motion for a new trial must be overruled.†

1-5 206

*JOSEPH VANCE v. THE BANK OF COLUMBUS. [214

Poundage is only due to the sheriff where he has actually made and received the money on execution.

THIS cause came before the court upon a writ of *certiorari*, from the Supreme Court of Champaign county, to the court of common pleas of the same county.

The facts of the case were these: At the April term of the common pleas, 1822, the bank obtained a judgment against Vance for six hundred dollars, upon which an execution was issued and levied upon real estate. A sale not being effected, in consequence of no person bidding the proportion of the valuation required by law, the execution was returned with the levy and valuation, and indorsed not sold for want of bidders. Several successive writs of *venditioni exponas* were issued, upon which the same return was made. After the last *vendi.* was thus returned, Vance paid the money to the bank, and paid up all the costs, but the poundage claimed by the sheriff. This he refused to pay, and made a motion in the common pleas to have an entry of satisfaction made on the judgment. This motion was resisted, and overruled by the court. To reverse this order the *certiorari* was brought.

†NOTE BY THE EDITOR.—See Swan's Stat. 265, sec. 1; ib. 267, sec. 8. For late decisions touching the acknowledgment of leases, see liii. 43.

Vance v. Bank of Columbus.

MASON and COOLEY, for plaintiff in *certiorari*:

In England, in New York, and perhaps elsewhere, the sheriff is entitled to his commissions, or poundage, whenever the execution is served or levied, whether the money be paid to him or not. This results from the terms used in the statutes giving the fees. The statute Elizabeth, chapter 2, provides that the sheriff shall be entitled to the fees allowed by the act *for serving the execution*; the New York statute is in the same terms. Under these statutes it is held that the sheriff's right to poundage depends upon his serving the execution, not upon his receiving the money. 5 Johns. 252. The terms of our statute are different. The sheriff's fees for every particular service are enumerated. "*Poundage on all moneys made on execution, two per cent.*," are the terms employed, and they import only moneys made by, that is paid to, the sheriff. It is given as compensation for the trouble and risk of receiving [215] and paying over the money; *and if the service be not performed no compensation can be due.

No counsel argued on the other side.

By the Court:

The distinction taken by the counsel, between the language of our statute and that of other countries referred to is a very clear one. The phrase, "*money made on execution*," can only relate to such sums as are actually paid into the sheriff's hands, upon the execution. The money is not *made* by the officer, when paid directly by the debtor to the plaintiff. A different construction would imply that the poundage was given merely to swell the bill of costs, and increase the sheriff's perquisites, and to this we can not assent. We agree with the counsel, that it is given as a compensation for services really performed. When this is not done compensation can not be claimed.

The order must be reversed, and the common pleas instructed to enter satisfaction on the judgment.

FULTON AND KIRKER v. STUART.

Where a lessee assigns a part of the premises leased to a third person, for the whole period of time of the lease, it is but an underleasing, and the lessor can sustain no action on the lease for rent against such assignee.

THIS was an action of covenant brought from Muskingum county. The declaration sets forth a lease for years, from the plaintiff to Jeremiah P. Munson, and alleges, that all the estate, right, title, and interest of the said Munson, the lessee, to the demised premises, except thirty feet square of vacant ground, by assignment came to the defendant, who had occupied the same, and assigns the non-payment of the rent reserved as a breach. The defendant demurred generally, and the decision was reversed.

SILLIMAN and SPANGLER, in support of the demurrer, cited :

Hartford v. Hatch, Doug. 183, as settling the doctrine, that an assignment of lease for any period of time short of the whole term, was but an underletting, upon which the lessor could sustain no action against the assignee *for the rent; and they argued [216 that an assignment of a part of the premises was as clearly an underletting, as an assignment of the whole for a part of the term only.

CULBERTSON, for the plaintiff, cited :

2 Chit. Pl. 455, 456; 1 Saund. 241, c; 2 East, 575; 1 Dal. 210; 1 Saund. 112; 4 Dun. & East, 75; and argued, that the assignee was liable for rent upon the privity of estate, and not upon the privity of contract, and that the same rule ought not to be applied to an assignment of part of the term, and an assignment of part of the premises.

By the Court :

It seems to be settled, that where a lessee assigns his lease for any shorter period of time than that for which the lease was granted, the lessor can not sustain an action of covenant against the assignee upon the lease; because this is considered, not an assignment of the whole term, but an underletting. The princi-

Fulton and Kirker v. Stuart.

ple applies with at least equal force to the case of an assignment, or underletting of a part of the premises only.

If the lessee constitutes two under-tenants, by assigning one-third of the leased premises to one, and one-third to another, retaining one-third himself, the lessor may have three distinct actions; and in apportioning the rent, the aggregate given against each might amount to more or less than the amount reserved, and the parties in either case would be without remedy. If the lessee underlet or assign the whole premises in equal quantities, to different persons, the lessor will be driven to as many actions against different persons, to recover his rent, instead of having one action against the lessee. For the separate assignee of a part can neither be charged with the whole rent individually, nor jointly, with one or more of his co-tenants.

In this case the declaration states, that the defendant was not assignee of the whole premises; he did not take, and does not hold, the whole term of the original lessee.

The demurrer must, therefore, be sustained.†

†NOTE BY THE EDITOR.—See also iii. 449; vii. 111, part 2.

CASES

DECIDED BY THE

Supreme Court of Ohio

IN 1826.

ORDERED TO BE REPORTED BY THE JUDGES.

LESSEE OF BENTLEY'S HEIRS v. DEFOREST.

Title to land can not be conveyed by assignment indorsed on the back of a deed.

TRIED before Judges PEASE and BURNET, in Trumbull county, 1826.

This was an action of ejectment. The plaintiff having offered in evidence, a deed conveying the premises in question, from Adgate to Vanderbarrack, with an indorsement thereon, subscribed by Vanderbarrack, by which he assigned *all his right and title in the deed to Bentley*, under whom the lessors of the plaintiff claimed as heirs at law, rested his cause.

WEBB, for the defendant, moved to overrule the testimony, and for a nonsuit, on the ground that the deed of assignment did not show a title to the premises in Bentley, the ancestor of the lessor.

Lessee of Ely v. McGuire.

222] *WHEELER, for the plaintiff, contended that the laws of Ohio did not prescribe any particular form of transferring the title to real estate. That the assignment was, in fact, a deed, and that the intention of the parties was sufficiently manifest to require the court to give it effect.

By the COURT :

There never has been a time, since the establishment of the territorial government, when the title to real estate could be conveyed by an assignment, indorsed on a deed. The ordinance for the government of the territory, provided that real estates might be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person, being of full age, in whom the estate might be; attested by two witnesses, provided such conveyances be acknowledged, or the execution thereof duly proved and recorded, etc. This form of conveying real estate has been recognized ever since.

The indorsement relied on as a deed conveys nothing but the instrument itself. It may vest in the assignee a right to the paper and the wax, but it can not affect the title to the land. It does not describe the land, or purport to convey it, much less does it contain the operative words of a grant. It is an assignment of all the right and title of the assignor in the deed on which it is written. In equity it might be considered as an executory contract, and on proof of the facts connected with it, might entitle the assignee to a decree for a specific performance, but it can not operate as a conveyance of the legal title.

Judgment for defendants.†

223]

*LESSEE OF ELY v. MCGUIRE.

Where the money secured by mortgage is due and unpaid, mortgagee may recover in ejectment against mortgagor.

Mortgaged premises may be sold, on judgment and execution against mortgagor.

TRIED before Judges HITCHCOCK and BURNET, in Clermont county, 1826.

†NOTE BY THE EDITOR.—Same principle, ii. 234.

Lessee of Ely v. McGuire.

This was an ejectment, brought by a mortgagee against the mortgagor, after the whole of the mortgage money had become due and payable.

The case was submitted without argument, on the single question, whether the mortgage deed be sufficient evidence of title to sustain the action.

By the Court :

We have always considered the title of mortgaged premises to remain in the mortgagor, as against all the world, except the mortgagee, and also as against him, until the deed becomes absolute at law, by the non-performance of the condition, and the mortgagee takes legal steps to reduce the premises to possession.

On this principle, we have decided that mortgaged premises may be sold on judgment and execution against the mortgagor, and that a mortgage, executed by the defendant, before the judgment, could not be set up as evidence of an outstanding title in an action of ejectment, brought by a purchaser under the sheriff, against the person in possession under the mortgagor, on the ground, that as the mortgage did not divest him of the legal title, the judgment was a lien on the premises, subject to the mortgage. In this case it appears that the money secured by the mortgage was due and unpaid. The condition was therefore broken. The deed has become absolute at law, and the plaintiff has a right to recover.

Judgment for the plaintiff.†

†NOTE BY THE EDITOR.—See also vii. 70, part 2; ii. 224. Sale of mortgaged premises on execution, see also viii. 21; ix. 28; x. 71. But the mortgaged premises must be appraised at full value, as if they were not incumbered, xi. 342; viii. 22; x. 71; xi. 450; xii. 81; xv. 106. So that the mortgagor's equity of redemption, if sold on execution, must cost the purchaser the full value of the land, xv. 106.

Lessee of Phelps v. Butler.

224]

*LESSEE OF PHELPS V. BUTLER.

Where lands have been sold at sheriff's sale, and ejectment is brought against the judgment debtor by the purchaser, the defendant can not set up an outstanding mortgage given by himself.

TRIED before Judges PRASH, HITCHCOCK, and BURNET, in Geauga county, 1826.

The cause was submitted to the court on the following agreed case: On March 6, 1819, A. Tannehill recovered a judgment in the court of common pleas of Geauga county, against S. Butler, the defendant, on which an *alias ft. fa.* issued on August 24, 1824, under which the land in question was levied on, sold, and purchased by the lessor of the plaintiff, and a deed thereof duly executed to him by the sheriff. The defendant obtained a legal title, to a part of the land in question on May 27, 1820, and to the residue on February 9, 1822. On March 19, 1822, the defendant executed a mortgage deed on the same, to S. Hinchley, to secure the payment of six hundred and twenty-eight dollars and forty cents. The plaintiff rests upon his title under the purchase at sheriff's sale, and the defendant sets up the outstanding mortgage in Hinchley. The defendant is in possession.

WHEELER, for plaintiff, contended, that the mortgagor, notwithstanding the mortgage, was deemed seized, and was the legal owner of the land. That an equity of redemption may be sold on execution against the mortgagor in possession. That a mortgage, before foreclosure, or entry, is not a legal title, which a stranger can set up. That defendant, in ejectment, can not set up a title in a third person, against the purchaser under an execution. That a sale of mortgaged premises, is merely a sale of the equity of redemption. That lands mortgaged, can not be sold on execution against mortgagee before a foreclosure, though the debt be due and the estate absolute at law. He cited Johns. Dig. 341; 6 Johns. 290, 343; 1 Caine's Cases in Error, 47, 183; 7 Johns. 278; 10 Johns. 185, 581; 3 Caine, 188, 222; 20 Johns. 223, 481; 4 Johns. 41.

Lessee of Phelps v. Butler.

*SLOAN, for defendant, insisted that a judgment was not [225 a lien on the debtor's land, when the title is obtained after the rendition of the judgment, until levy made; and that if such land be aliened before levy, the title is good. That the legal title to the lands in question, at the time of the levy, was in Hinchley, and that Phelps acquired no title by the sheriff's deed. That the plaintiff must recover on the strength of his own title. That defendant may protect himself by an outstanding title in a third person. That the mortgagor is tenant at will to the mortgagee. That the legal estate is vested in the mortgagee, and that persons claiming under him, must recover in ejectment. He cited 1 Ohio, 313; 6 Binney, 145; Peak's Evidence, 314; Addison, 254, 393; 1 Dall. 18.

By the Court:

The main question set up in the defense is whether a person in possession of land, which has been sold on judgment and execution against him, can defend himself against the purchaser under the sheriff by setting up a mortgage executed by himself, on the premises, before the judgment became a lien on those premises. The question may be so stated, because it has been decided by this court in *Rhodes v. Symmes*, 1 Ohio, 313, that a judgment is not a lien on after-acquired lands till a levy is actually made; consequently the case stands as it would have done if the mortgage had been executed before the rendition of the judgment.

It has been decided by this court, as often as the subject has been presented, that the execution and delivery of a mortgage does not divest the mortgagor of his legal title. In *Hitchcock v. Harrington*, 6 Johns. 290, it is stated by Kent, Chief Justice, to be the settled law in that court, and in the court for the correction of errors, that the mortgagor is to be deemed seized (notwithstanding the mortgage) as to all persons, except the mortgagee and his representatives. When the interest of the mortgagee is not in question, the mortgagor, before foreclosure or entry under the mortgage, is now considered at law as the owner of the *land, and it was decided in that case that neither the heir [226 of the mortgagor nor his assignee could deny the seizin. The mortgage is for the exclusive benefit of the mortgagee and those claiming under him, and until steps are taken to enforce it, it is only a lien on the land in which third persons have no concern.

Lessee of Phelps v. Butler.

A mortgagor can not be permitted to disown his legal rights to the prejudice of his creditors, or to protect himself in the possession and enjoyment of his estate, by admitting the existence of rights in third persons, who do not appear to set them up, which rights can not be affected directly or indirectly by the success or failure of his defense. The property in the possession of the plaintiff will be as liable and as sufficient to satisfy the debt as it will be if it remains with the defendant. If the mortgaged premises be of greater value than the debt for which they are pledged, the plaintiff, by his purchase from the sheriff, is entitled to the difference. The equity of redemption, as well as the legal estate, was vested in Butler at the time of the levy and sale, and it was decided in *Waters v. Stewart*, 1 Caine's Cases Error, 47, that an equity of redemption may be sold on execution.

The rights of Hinchley are not involved in this question. Were he in possession, and an ejectment brought against him, he might protect himself by his mortgage, but neither the mortgagor nor any other person not claiming under the mortgage, can set up the right of the mortgagee to defeat the sheriff's sale.

In *Klein's Lessee v. Graham*, 3 Caine, 188, it was decided that in an action of ejectment, by the purchaser at sheriff's sale against the debtor, the defendant can not show title in another, because the plaintiff goes into his shoes, and acquires the same right, whether possessory or otherwise, which he held, and nothing more. Much less shall he be permitted, as in the present case, to set up a mortgage executed by himself, which not only admits his possessory right, but also his legal title.

The plaintiff purchased all the right of Butler, be it more or less, and if that right consisted merely of a naked possession, Butler can not be permitted to dispute it.

227] *In *Jackson v. Willard*, 4 Johns. 41, it was said to be an affront to common sense to say that a mortgagor in possession was not the real owner. In that case it was decided that the mortgagee held only a chattel interest, which could not be sold on execution after the debt become due, but before foreclosure, and while the mortgagor remained in possession. This being the law in relation to the rights of the mortgagee, if mortgaged premises can not be sold as the property of the mortgagor, subject to the mortgage, they are placed beyond the reach of creditors, and are completely protected against the debts both of mortgagor and

Byington v. Geddings.

mortgagee. But we do not consider it necessary to pursue this subject further. We are satisfied with the decisions heretofore made, that the legal title to mortgaged premises remains in the mortgagor, while he continues his possession, whether the debt for the security of which the mortgage was given, has become due or not. On this ground the sheriff's sale was regular; the purchaser acquired the legal title, subject to the mortgage, and he stands in the shoes of the mortgagor, who can not be allowed to set up the mortgage as evidence against his own title.

Judgment for plaintiff.

BYINGTON v. GEDDINGS.

The holder of a note payable to R. K. or bearer, in cattle, may recover upon it in his own name. But he must aver and prove that the note was delivered to him for a good consideration.

THIS was a writ of error before Judges PEASE and BURNET, at the August Term, 1826, in the county of Ashtabula.

The case was this: Byington gave a note in April, 1822, for sixteen dollars, payable in cattle, to R. Knapp or bearer.

Geddings brought an action in his own name, in which he declared on the note, without showing how he became possessed of it, whether by assignment, delivery, or otherwise. The defendant demurred. The court sustained the declaration, and gave judgment for the plaintiff, to reverse which the writ of error was taken.

*By the Court:

[228

This note was not negotiable. The statute of 1820 does not, like that of 1810, embrace notes payable in property. The right of the plaintiff, therefore, to recover in his own name, depends on the form of the note and the operation of the promise. We consider the promise in the note as made, not only to Knapp, but to the person to whom he should deliver it.

The objection taken in the argument that the note was not indorsed, is not entitled to any weight. An indorsement is not necessary to pass the interest of the first holder—a delivery is suf-

Byington v. Geddings.

ficient for that purpose. It is well settled that the holder of a note, payable to bearer, may recover the contents in his own name, provided he has obtained it for a valuable consideration, in the fair course of trade. To entitle a holder to recover on such a note, in his own name, it must be stated as a part of his title, and proved at the trial, that the note was delivered to him for a valuable consideration, or that he acquired it in the usual course of trade or business. It was decided in *Grant v. Vaughan*, 3 Burr. 1516, that a negotiable note, payable to bearer, may be recovered in an action for money had and received. But in this case the action is founded on the note, which is declared on as though it were made payable to the plaintiff, he being the bearer. Under these circumstances he is bound to make the averments before stated, and also to prove them. Without these averments and this proof, he can not maintain his right to a recovery. He can not rely on the presumption that he obtained the note fairly. That fact is a substantial part of his title, which must be averred and proved. Without the averment, he sets out a defective title; and without the proof, he does not sustain the title. For anything that appears in the record, the note might have come into the hands of the plaintiff by fraud or accident, without delivery or consideration. In the first instance, the right was vested in Knapp, and the record does not show that that right has been transferred. We consider it to be as necessary to aver a delivery in this case as it is to set out an assignment on a note payable to order. The declaration is therefore defective, and the court erred in overruling the demurrer.

Judgment reversed.†

†NOTE BY THE EDITOR.—As to the negotiability of notes not payable in money, see i. 115, 189; iii. 51; vi. 279; xiv. 455; xv. 118; xvi. 5. To be negotiable, a note must be an *unconditional* promise to pay, xiv. 455.

Colwell, Adm'r, v. Bank of Steubenville—Lamb v. Stewart.

***COLWELL, ADMINISTRATOR, v. BANK OF STEUBENVILLE. [229**

In foreign attachment under the act of 1810, judgment is erroneous unless three months' notice be given.

THIS case came up on writ of error, before Judges BURNET and SHERMAN, at the July Term, 1826, in Union county.

It was a writ of foreign attachment on which final judgment had been rendered in the court of common pleas.

From the record it appeared that notice of the issuing of the writ had been published only six weeks, which was the principal error relied on.

The cause was submitted without argument.

By the COURT:

It appears that the writ of attachment issued under the statute passed in 1810, and that the plaintiff has pursued the fourth section of that act which relates to domestic attachments, instead of the fifteenth section which directs the mode of proceeding on foreign attachments. This section requires a notice of three months before the rendition of judgment, and expressly provides that no judgment shall be entered in cases to which it relates, until the notice required shall have been given.

As this is a statutory proceeding unknown to the common law, it is necessary to pursue it strictly.

Judgment reversed.†

***LAMB v. STEWART.**

[230

Declarations made by a witness previous to his examination, contrary to his statements when examined, is admissible to discredit his testimony.

THIS case came before Judges PEASE and BURNET, on a writ of error, at the August Term, 1826, in the county of Ashtabula.

†NOTE BY THE EDITOR.—See ix. 108, and cited cases.

Lessee of Hughey v. Horrel & Co.

It appeared from the record, that the plaintiff in the trial before the common pleas, called a witness, who testified to certain items in his account against the defendant. The defendant then offered to prove that the same witness, on a former occasion, when conversing on the same subject, not being under oath, had made different statements. The testimony offered, was objected to and overruled, and a bill of exceptions taken.

The case was submitted without argument.

By the COURT:

The testimony offered by the defendant was strictly legal. He had a right to discredit the witness, who had been examined against him, and one method of effecting that object was, by proving that he had told different stories, at different times, when conversing on the same subject. Such evidence is always admitted when offered, and the effect of it is left to the jury.

Judgment reversed, and cause remanded.†

231]

*LESSEE OF HUGHEY v. HORREL & Co.

Lands in the Virginia Military District divided by county lines, where the owner resides on part, can only be listed for taxation in the county where the owner resides.

If otherwise listed and sold for taxes, the sale is void. Advertisement of sales of lands for taxes must be made in two newspapers; one at the seat of government, one in the county, or, if none there, then one in most general circulation there. Sale without such advertisement is void.

THIS was an action of ejectment, tried before Judges BURNET and SHERMAN, at the July Term, 1826, in the county of Madison.

As the case turned on the sufficiency of the defendant's testimony, who claimed under a tax title, it is not necessary to state more of the case than will be sufficient to present the points on which it was decided.

†NOTE BY THE EDITOR.—Contradictory statements on oath neutralize each other, and are disregarded entirely, vii. 88, part 2; xvi. 338.

Lessee of Hughey v. Horrel & Co.

It appeared from the testimony, that the county line divided the land, part of it being in Madison and part in Pickaway. The land was entered for taxation in the county of Madison, in the name of E. Prichard, who lived on that part of the tract which was within the county of Pickaway. The land was charged with the taxes of 1820 and 1821. The notice was published in a newspaper printed at Columbus, and in no other. The newspapers of Chillicothe and of Springfield have a partial circulation in Madison, but the Columbus papers have the most general circulation. There was no newspaper printed in the county of Madison.

The principal objections to the validity of the tax title were, that the land had not been listed according to law, and that the notice had been published in one paper only, when the law required it to be published in two. Other objections were taken which it was not thought necessary to decide.

By the COURT:

Section 9 of the act of 1820, under which the land in question was listed and sold, makes it the duty of the county auditor to call on each resident proprietor of lands within his county, and take a list of all his lands subject to taxation within the county, with a proviso, "that all lands lying within the Virginia military district, which shall be divided by county lines, so as to leave parts of said tracts in two or more counties, shall be listed by the proprietor, in the county in which he lives." By section 13, it is made the duty of the auditor, on failure of the proprietor to furnish a list, [232 to enter the land from the best information in his power. As the land in question was within the Virginia military district, and divided by a county line, and as Prichard, the proprietor in whose name it was listed, resided in the county of Pickaway, the auditor of Madison was not authorized to enter it on his list. It was made the duty of the proprietor to enter it in the county in which he lived, and on his failure to do so it ought to have been entered by the auditor of Pickaway.

It is evident, therefore, that this land has not been entered in conformity with the statute, and that it has been sold by an officer who was not authorized by law to make the sale.

Section 38 provides, that the county auditor, on receiving the delinquent list, shall forthwith cause the same to be advertised six weeks successively, in some newspaper printed at the seat of govern-

Lessee of Hughey v. Horrel & Co.

ment in this state, and also in a newspaper printed in his proper county, if any such there be, and if not, in some newspaper in most general circulation in said county.

It is contended by the defendant, that as there was no paper printed in the county of Madison, and as the Columbus paper was in general circulation in that county, it was not necessary to publish the notice in any other. The law does not admit of such construction. The publication must be made in two papers, one printed at Columbus, and the other in the county where the auditor resides, if there be such a paper, and if not, then in some paper (other than the one printed at the seat of government) in most general circulation in his county.

The object of the legislature in both of these provisions is obvious.

The first was intended for the convenience of the resident proprietor, and for the safety of all others concerned.

Instead of dividing the tract, and requiring double entries and payments, they have required it to be entered and paid in one county, and to prevent confusion they have designated which that should be.

For anything that appears, the land may have been entered and the taxes paid in Pickaway. The other provision was designed to 233] extend the notice, as generally as possible, *for the information of owners, and for the purpose of increasing competition at the sale.

The requisitions of the law are substantial and useful, and can not be dispensed with. Tax sales are attended with greater sacrifices to the owners of land than any others. Purchasers at those sales seem to have but little conscience. They calculate on obtaining acres for cents, and it stands them in hand to see that the proceedings have been strictly regular.

The jury rendered a verdict in conformity with this opinion, on which judgment was entered.

ANN MATTOX v. WILLIAM MATTOX.

Bill for Divorce.

Divorce not granted where the applicant is living in adultery.

THIS case came before Judges HITCHCOCK and BURNET, at the May Term, 1826, in the county of Adams.

The principal charge relied on in the bill was the adultery of the husband, which was very satisfactorily proved; but on cross-examining the witnesses it appeared that the complainant was living and cohabiting with another man, who had deserted his wife, and that she had had a child by him.

By the COURT:

The bill must be dismissed. It would be a libel on the legislature to suppose that the statute was designed for the convenience of that class of characters to which these parties seem to belong. It was intended for the relief of injured innocence; not to encourage persons of loose morals, or rather of no morals at all, to live in the open, scandalous violation of the common rules of decency.

This application is to the equitable jurisdiction of the court, and must be decided by the principles which prevail in courts of equity. The complainant must come *with clean hands [234 and a chaste character, not stained with the same infamy and crime of which she complains. These parties are *in pari delicto*, and to grant relief to either of them would be offering a bounty to guilt. It would place the permanency of the marriage contract, in every case, at the disposal of the contracting parties, and remove one of the strongest motives to that correctness and chastity of conduct which is necessary to render the marriage state either pleasant or convenient.

The ground on which this bill is dismissed is not new in the practice of this court. Many have been dismissed for a similar reason, and we had reason to believe that the practice was sufficiently known to prevent applications liable to this objection.

Bill dismissed.

Lessee of McCullough's Heirs v. Rodrick, etc.

LESSEE OF McCULLOUGH'S HEIRS v. RODRICK, ETC.

Insolvent in Pennsylvania, assigning all his estate, both real and personal, does not pass real estate in Ohio.

THIS cause was tried before Judges HITCHCOCK and BURNET, at the April Term, 1826, in the county of Pike.

The plaintiff, having exhibited a patent to the ancestor of his lessors, covering the land in controversy, and proved the possession of the defendant, rested his cause.

The defendant then offered a transcript from the State of Pennsylvania, for the purpose of showing that S. McCullough, under whom the plaintiffs claim, had taken the benefit of the insolvent act, and assigned his property for the use of his creditors. The assignment was in these words: "I do hereby assign all my estate, real, personal, and mixed, to J. B. and J. H., in trust for the use of my creditors. In testimony whereof, I hereunto set my hand and seal, December 11, 1824; and I do hereby authorize and empower any attorney to appear for me, in an amicable ejectment in the name of the assignees, and confess judgment for the two hundred and seventy-three acres with the appurtenances.

235] *This testimony was objected to, and overruled by the court, on the ground that whatever may have been the effect of the assignment in Pennsylvania, which was a question not necessary now to be decided, it could not pass the title to real property in Ohio, which must be transferred in pursuance of our own laws. The legal title, therefore, remained in the assignor, and descended, at his death, to the lessors of the plaintiff, who are his heirs at law.

If we were disposed to give to this document the greatest effect that can be claimed for it by the defendants, it would show nothing more than an outstanding equity in third persons, which can not be set up to protect the defendants' possession against those who hold the legal estate; and as this is the only use that could be made of it, it can not be received as evidence.

Verdict for the plaintiff.

LESSEE OF SHALER v. MAGIN.

Occupying claimant is entitled to pay for improvements made before his title commenced.

THIS case came before Judges HITCHCOCK and BURNET, at the May Term, 1826, in the county of Adams.

The commissioners appointed at the last term to estimate the valuable and lasting improvements made on the premises, prior to the commencement of the ejectment, having reported, Mr. Brush moved, on behalf of the successful claimant, to reject the report and discharge the commissioners, on the ground that the improvements were made before the title commenced under which the defendant claimed.

The facts, as they appeared from the reports and the testimony, were these: An entry had been made on the land in dispute prior to the year 1818, under which the defendant took possession, and made the improvements in question. In October, 1818, after the improvements had been made, the entry was withdrawn, and about the same time *another entry was made on the same land by [236 Ellis, under whom the defendant claimed.

By the COURT:

This motion can not be sustained. The defendant had an equitable title of record at the time he commenced his improvements, which continued till the improvements were completed. His possession was not interrupted by the withdrawal and re-entry of the warrant, nor were the rights of the plaintiff in any manner affected by that circumstance.

But independent of this consideration, we discover nothing in the statute that limits the claim of the occupying claimant to a compensation for such improvements as were made after the commencement of his title. The statute is in the present tense: "When any occupying claimant, being in quiet possession of land, from which he can show a plain and connected title in law or equity," etc. If any person shall set up and prove an adverse, and better title to said land, such occupying claimant shall not be evicted, until he shall be fully paid the value of all lasting and valuable

Lessee of Shaler v. Magin.

improvements made by such occupying claimant, or the person under whom he may hold the same, previous to receiving actual notice by the commencement of suit, etc.

The exhibition of his title is to be made to the court at the rendition of the judgment, and if he can show such a title as is required by the statute, he is protected in his possession till he shall be compensated for the improvements made by himself, or by the person under whom he claims. There is nothing in the law that excludes a right to receive pay for improvements made by the tenant, or the person under whom he claims, at *any time* before the commencement of the suit.

It sometimes happens that persons seat themselves on vacant lands, make valuable improvements thereon, and afterward locate it. In such a case, if, in consequence of a defect in their entry, a junior entry should prevail, we can not see anything in the law, or in the policy on which it is founded, that entitles the successful claimant to take the improvements, without making compensation to the tenant.

237] *It may also be remarked that in this case it does not appear at what time the better title of the successful claimant commenced; whether before or after the making of the improvements in question.

It is not necessary now to decide that an unsuccessful claimant must in all cases be entitled to pay for improvements made before the commencement of his title, although the statute does not contain anything expressly prohibiting it, yet a case might arise accompanied by such circumstances, as would take it without both the letter and equity of the statute. All we mean to say is, that this is not a case of that character.

Motion overruled.†

†NOTE BY THE EDITOR.—See also the same principle, etc., vi. 16; xiii. 308, where this decision is recognized.

For other and later decisions relating to occupying claimants, see xiii. 368; xi. 35; xv. 13, 152, 285. See also xlvii. Ohio L. 56.

MARTIN v. BOON AND McDOWELL.

Notoriety of entry.

THIS case was heard before Judges HITCHCOCK and BURNET, at the May Term, 1826, in the county of Brown.

The following testimony was given; Ellis Palmer swore, that he was on Todd's expedition in July, 1787.

They crossed the Ohio at Limestone, fell onto Big Three-mile creek, continued up it, crossing it frequently till they came to where Shepherd now lives, from thence they bore up, on the west side, to where the beginning of Minnis' survey was made, at a walnut and two sugar trees, on the east side of the creek, and east side of the trace. Letters were made on the walnut, but does not recollect what they were; has seen the tree every year since, except in 1818 and 1819.

Has always heard that called the beginning corner of Minnis' survey. The corner trees stand near to where the trace crosses the creek the last time. He showed the corner to the county surveyor of Brown.

There were about three hundred men on the expedition. The trace was plain but narrow. Kenton called it the *old war road from Limestone to old Chillicothe*. Three-mile creek empties about three miles below Limestone. It is the first creek *below [238 Limestone, except *Fishing-gut, so called, which is the first below Limestone*, on the Ohio side. Has not heard it called a creek, or by any other name than Fishing-gut.

Limestone and Kenton's station were the nearest settlements to the survey. The trace was generally known by the name of Todd's trace, and was plain enough to be followed.

The mouth of Limestone creek was notorious in 1784, and has always been known by that name.

Benjamin Beasley testified, that he settled in Manchester in 1790. Shortly after he heard of Todd's trace running up Three-mile creek, and about the same time he heard of the tree spoken of by Palmer. He was acquainted with the beginning corner of T. Peyton's entry, and showed it to the county surveyor of Brown.

Manchester was settled in the year 1790. He became acquainted

Martin v. Boon and McDowell.

with the branch, on which T. Reese lives, in 1797; it was called Covert's run.

On the part of the defendants, it was testified by N. Beasley, that *the first creek* on the north side of the Ohio, below Limestone creek, is called *Fishing-gut*. It went by that name since 1791. According to his apprehension, Fishing-gut is of such size and description as to entitle it to the appellation of creek. It is such as surveyors have been in the habit of calling creeks.

Fishing-gut empties into the Ohio better than two miles above Three-mile creek.

In 1803 he became acquainted with the beginning corner of Minnis' survey; has seen it several times, and has surveyed from it; he never saw any letters on it.

The corner is about five mile from the nearest point on Fishing-gut creek. He does not know that he has heard the people call Fishing-gut a creek; he has generally heard it called Fishing-gut only.

Three-mile creek was generally known by the name of *Big Three-mile*.

James Pilson, being asked the name of the first creek below Limestone, answers Fishing-gut is the first that would be called a creek. It is not a large stream. Does not know its length; there 239] is a mill on it; always heard it called *Fishing-gut; believes he should call it a large branch; it empties about two miles above Big Three-mile.

He has seen the walnut on Big Three-mile, claimed as the corner of Minnis' entry, and has made a survey from it. He thinks he saw marks on the walnut, but can not tell what they were. Big Three-mile is the first creek on the north below Limestone, if Fishing-gut is not considered a creek.

Peter Lee testified that he was with Col. Todd on his expedition in 1787. They crossed the river at Limestone, then a landing place of great notoriety; they crossed Three-mile creek several times. It was then, and has ever since been known by the name of *Three-mile*. After they crossed the creek the last time they followed a trace previously existing. The trace crossed the creek the last time near where two branches unite.

At the time the expedition went out, there were several stations settled in Mason county, Kentucky, from which there were men

Martin v. Boon and McDowell.

on the expedition. After the expedition, the trace was called Todd's trace, and could have been found and followed.

Limestone, Todd's trace, and Three-mile creek, in 1787, were places of great and general notoriety.

The cause was argued by

BRUSH, for the complainant.

MARSHALL, for the defendant.

By the COURT:

The complainant claims under an entry made in May, 1797, in the name of Timothy Peyton, in the following words: "Timothy Peyton (heir) enters one thousand acres of land, on part of a military warrant, No. 1,296, on the waters of Three-mile creek, beginning at the most westwardly corner of William Love's entry, No. 2,712, running with his line north forty six degrees east passing his corner to the line of Thomas Perkins' entry, 2,798, thence with his line north sixty degrees west to his corner, thence north thirty degrees east to another corner in the line of Isaac Hite's survey, 1,759, thence north sixty degrees west so far that a line north sixty degrees west from the beginning, at right angles with the line north thirty degrees east, will include the quantity.

*The defendants claim under an entry made in 1796, in [240 the name of John Bartlett, and are in possession under the oldest patent. This being the case, they can not be disturbed till the complainant makes out an equitable title, clearly and satisfactorily. The merits of that title must therefore be first investigated.

It is very evident that the call for the waters of Three-mile creek, though a good descriptive call, is too vague and uncertain to ascertain the locality of the land intended to be covered by the entry; recourse must therefore be had to the other objects referred to. Love's entry, a corner of which is called for as a beginning, calls for the lower corner of Jacob Edwards, in the line of P. Slaughter's survey. Edwards calls for Slaughter's survey, which lies opposite the mouth of Limestone, and is admitted to be special and abundantly notorious. The complainant has, therefore, succeeded in establishing his beginning corner. But this is not enough. As he calls to run from his beginning, with the line of Love's entry, to the line of Perkins' entry, without giving the distance, the ter-

Martin v. Boon and McDowell.

mination of his first line can not be known, without establishing and locating the lines of the entry by which it is to be bounded, as it is taken for granted that the lines of every entry are open and can not be ascertained without a survey.

On looking into the entry of Perkins, we find it depends altogether on the survey of H. Brooks. H. Brooks' survey depends on other surveys called for, which surveys depend on the survey of Samuel Hopkins. Hopkins' survey calls for the southeast corner of Callohill Minnis' survey, No. 460, and depends on it, consequently it is indispensably necessary, for the complainant to establish this survey of Minnis, in order to sustain his own entry.

It appears that the intermediate entries called for have been correctly surveyed, so that no difficulty arises from that source. The right of the complainant to question the defendants' title, must therefore depend on the validity of Minnis' survey, No. 460, as that claim must be correctly located and established before he can ascertain the termination of his first line.

241] *Minnis' survey calls to lie "on the northwest of the Ohio, on the waters of Three-mile creek, beginning at a walnut marked H. and two sugar trees, on the bank of the creek, running north thirty east four hundred poles," etc.

It must be evident, that this survey does not contain the precision and certainty in its calls that is necessary to enable a subsequent locator to ascertain its situation. The waters of a creek and a marked tree on the bank of the creek, is too general a description. It imposes on the inquirer the necessity of examining the timber on both sides of the creek, from its mouth to its source. The length of this creek does not appear, but from circumstances it must be of considerable extent. It is called by way of distinction *Big Three-mile*, and the witnesses speak of several branches which empty into it. The valley of such a creek must be too extensive to be searched by subsequent locators, for the purpose of finding a marked tree; and without that tree, the beginning corner of the survey can not be determined.

But the complainant rather relies on the entry, which he contends has been surveyed in strict conformity with its calls, and which is in these words, "Callohill Minnis enters one thousand acres," etc., on the waters of the first creek emptying into the Ohio below Limestone, beginning at a walnut marked I H, by a branch, where the left wing of Colonel Robert Todd's scout crossed in June, 1787. running

Martin v. Boon and McDowell.

north thirty east four hundred poles, etc. Although the survey appears to have been made in strict conformity with the courses and distances of the entry, yet we discover a striking difference in the calls. The entry calls for the first creek below Limestone, and for a walnut marked I H by a branch. The survey calls for 'Three-mile creek and for a walnut marked H, on the bank of the creek. This discrepancy was calculated to produce doubt and uncertainty. It imposed on the inquirer the task of deciding what streams were denominated creeks, in order to ascertain whether Three-mile was, or was not, the first creek. But suppose this difficulty overcome. Is he to look for a walnut marked H, on the bank of the creek, or for a walnut marked I H, by a branch of the creek, and if he should find either, how is he to know whether it be the right one or not?

*But we will pass over these difficulties for the present, [242 and examine the entry on which the complainant relies, without reference to the terms used in the survey.

1. It calls for the waters of the first creek emptying into the Ohio below Limestone.

2. For a walnut marked I H.

3. For the branch where the left wing of Colonel Todd's scout crossed in 1787.

1. Ellis Palmer states that Minnis' survey was on Big Three-mile creek, which was always said to be three miles below Limestone. On being asked if it was not the first creek, that empties into the Ohio below Limestone, he answers, "it is, except Fishing-gut, so called, which is the first below Limestone on the Ohio side." He further states that he never knew it call by any other name than Fishing-gut.

James Pilson being asked the name of the first creek below Limestone answers, "Fishing-gut is the first that would be called a creek." He further states that it is not a large stream; that he does not know its length; that there is a mill on it; that he always heard it called Fishing-gut; believes he should call it a large branch; that it empties about two miles above Big Three-mile.

N. Beasley states that *the first creek* on the north side of the Ohio below Limestone creek is called *Fishing-gut*; that it went by that name in 1791; that according to his apprehension Fishing-gut is of such size and description as to entitle it to the appellation of a creek; that it is such as surveyors have been in the habit of call-

Martin v. Boon and McDowell.

ing creeks, and that it empties better than two miles above Three-mile creek.

On this evidence the complainant relies to establish the notoriety of Three-mile as *the first creek* below Limestone; but instead of proving that fact, it rather shows it to be the *second creek*. On such information, a subsequent locator would naturally go on to Fishing-gut in search of Minnis' survey, the beginning corner of which is said to be at least five miles from the nearest point of that stream: The witnesses all speak of it as a creek, though they do not remember of hearing it expressly called so. General Beasley, who has been a surveyor many years, calls it a creek, and states 243] *that in size and description it is such a stream as surveyors have been in the habit of calling a creek. If it be urged that its appropriate name was Fishing-gut, it may be replied that the appropriate name of the other was Big Three-mile, and a person hearing their names would naturally consider them both to be the names of creeks. There is no evidence to show that Three-mile was understood to be the first creek below Limestone, or that it was known by that name among locators, or others, either when the entry in question was made, or at any time since.

Palmer states that in 1787, it was known by the name of Big Three-mile, probably to distinguish it from a smaller stream in the neighborhood, known by the same name. In the survey, it is simply called Three-mile creek, which varies both from the description in the entry, and from the real name, as proved by all the witnesses.

Here naturally arises the question, why was the watercourse designated in the entry by a description, when it had an appropriate name, notorious in the contiguous settlements? If Minnis' entry was really on the creek claimed, it ought to have been called Big Three-mile, which was at that time its appropriate name, and by which subsequent locators might have readily found it, as that name not only identified the watercourse, but was expressive of its true situation in reference to the mouth of Limestone. By omitting the name and describing it as the first creek, subsequent locators were not merely left in doubt and uncertainty, but were liable to be misled and thrown onto Fishing-gut, which, from the weight of evidence, might fairly be considered as a creek, and the first creek below Limestone.

The next call is for a walnut marked I H.

Martin v. Boon and McDowell.

Palmer states that at the beginning corner of Minnis' survey there was a walnut marked, which he saw within a few minutes after the corner was made; that there were letters on it, but he does not remember what they were, though he says he saw the tree every year afterward for more than twenty years.

Benjamin Beasley settled in Manchester in 1790. Shortly after, he heard of the tree spoken of by Palmer. It does not appear that he ever saw it; he gives no description of it, *nor does he [244 know anything of the letters by which it was distinguished in the entry of Minnis.

General Beasley states that he became acquainted with the beginning corner of Minnis' survey in 1803; that he has seen it several times and has surveyed from it, but that he never saw any letters on it, and that it is five miles from the nearest point on Fishing-gut creek.

James Pilson has seen the walnut on Big Three-mile, claimed as the corner of Minnis' entry, and has made a survey from it. He thinks he saw the marks on it, but can not tell what they were.

This is all the evidence relating to that point, and it certainly falls very far short of establishing the notoriety of the tree in question.

The entry calls for a walnut marked I H; the survey calls for a walnut marked H. The witnesses, except Palmer, do not know that the tree claimed by the complainant to be Minnis' corner was ever marked with any letters, and Palmer does not know that it was marked with either of the letters named in the entry. As walnut is a common timber in the part of the country where the land lies, and particularly on watercourses, the call for a tree of that description is of but little use, unless it be distinguished by some peculiarity generally known, of which information can be obtained in the contiguous settlements, and by which it can be distinguished from other trees of the same kind. It is therefore necessary to prove that the tree in question contained the distinguishing marks described in Minnis' entry, and that it had acquired general notoriety at the date of the complainant's entry.

The third call is "the branch where the left wing of Col. Todd's scout crossed in 1787."

Palmer states that the trace was generally known by the name of Todd's trace, and was plain enough to be followed.

Martin v. Boon and McDowell.

Benjamin Beasley says that shortly after he came to Manchester, in 1790, he heard of Todd's trace running up Three-mile creek. The scout crossed at the mouth of Limestone, which was a place of general notoriety, and the trace commenced on the bank [245] of the river opposite the mouth of that creek. Before, and down to the time of that expedition, the trace appears to have been known by the name of the old war road.

We will concede for the present that these witnesses prove the notoriety of the trace, and proceed to inquire whether this call is in other respects sufficiently sustained.

1. The entry refers to a trace running up the first creek below Limestone. In addition to what has already been said on this part of the case, we will only remark that if Fishing-gut is to be considered the first creek, the call for a trace on a different creek can not help the entry.

2. The entry calls for an object by a branch of the creek; the survey calls for the same object on the bank of the creek.

The entry calls for the corner by a branch, where the left wing of the scout crossed, not for the trace which must have been followed by the main body of the detachment, and which crossed the creek.

From the very terms used it is apparent that the corner was not on the trace spoken of by the witnesses as being plain and notorious, but at some point on a branch where one of the wings crossed. How far the left wing marched from the trace, or at what point they left it, is uncertain, nor does it appear that there was anything to designate the route of that wing, by which a surveyor could be enabled to follow it so as to ascertain where it crossed the branch, nor does it appear at what distance, or in what direction the branch was from any given object. This circumstance seems to account for the discrepancy between the corner called for in the entry and the one from which the survey was made. The latter is on the bank of the creek, where the trace most probably passed; the former is by a branch, where the left wing crossed; but what branch, or how far from its mouth, or from the trace, is altogether uncertain.

The survey of Minnis appears at this day to have acquired very general notoriety, but that was not the fact when Peyton's entry was made.

 McVickar v. Heirs of Israel Ludlow.

On the whole, we are of the opinion that the complainant has not sustained the equitable claim set out in his bill.

*It is, therefore, unnecessary to examine the case on the [246 part of the defendants.

Bill dismissed.

McVICKAR v. HEIRS OF ISRAEL LUDLOW.

On *sci. fa.* to make heirs party to a judgment against administrators, and subject land taken by descent to execution, it is necessary to recite that the judgment is in force and unsatisfied, and that the personalities in the hands of the administrators are exhausted.

THIS case came up on a writ of error, at the May Term, 1826, in the county of Hamilton, before Judges HITCHCOCK, BURNET, and SHERMAN.

A writ of *scire facias* had issued in the court below, in the following words: "Whereas, in the term of December, Anno Domini 1818, of the court of common pleas within and for the county aforesaid, D. McVickar recovered a judgment, by reason of the non-performance of certain promises and undertakings lately made, etc., against John Ludlow, James Findlay, David Risk, and Charlotte C. Risk, being the surviving administrators of the goods and chattels of Israel Ludlow, deceased, for the sum of twelve hundred and forty-eight dollars, for his damages, together with the sum of twenty-three dollars and twenty cents, for his costs and charges, by him, about his suit, in that behalf expended; and it being represented to us that James C. Ludlow, Israel Ludlow, A. Dudley, and Catharine his wife, late Catharine Ludlow, Jephthah D. Garrard, and Sarah Bella his wife, late Sarah Bella Ludlow are heirs at law of the said Israel Ludlow, deceased, and that they have lands lying in the county of Hamilton, which they received from their ancestor, the said Israel Ludlow, deceased, as we, by the suggestion of the said D. McVickar, have been given to understand; we therefore command you, that you give notice to the said James C. Ludlow, Israel Ludlow, A. Dudley, and Catharine his wife, Jephthah D. Garrard, and Sarah Bella his wife, children and heirs of Israel Ludlow, deceased, if they may be found in your bailiwick, to be and appear before the honorable the judges of the

McVickar v. Heirs of Israel Ludlow.

247] court of *common pleas, at Cincinnati, within and for the county, on the 29th day of November next, to show cause, if any they have or can show, why the said D. McVickar should not have execution of the judgment aforesaid, and the same be levied of the lands and tenements so by them, the said James C. Ludlow, Israel Ludlow, Jephthah D. Garrard, and Sarah Bella his wife, A. Dudley, and Catharine his wife, children and heirs as aforesaid, held agreeably to the statute of this state in such case made and provided, if they shall think fit, and further to do and receive what may be then and there considered concerning them, and have then and there this writ. Witness," etc.

A rule for plea was taken, and at the August term, 1825, the defendants were defaulted and judgment entered; and afterward, at the same term, on motion, the judgment was set aside. The defendants then demurred to the *scire facias*; the demurrer was sustained and judgment rendered for the defendants, to reverse which this writ of error was taken.

GAZLAY, for plaintiff, assigned for error:

"That the court set aside the judgment entered in favor of plaintiff on motion, no reasons in arrest being filed or stated, and no other memorandum being made of any objections to said judgment. For these and other errors, appearing on said record, the plaintiff prays a reversal of said judgment, and that the court will give him the judgment which the court of common pleas ought to have given, with his debt and cost."

ESTE, for defendant in error, cited, 22 Ohio Laws, 118; *Jefferson v. Moreton*, 2 Saund. 7, 8, 12, and insisted that the *scire facias* was defective, and not sufficient to warrant the judgment prayed for by the plaintiff.

By the COURT:

In deciding this case, it will be proper to examine the errors assigned for a reversal of the judgment in the court below, and also the grounds of the plaintiff's claim, to a judgment in his favor, in this court.

248] *It was decided in *Botkin, etc. v. The Commissioners of Pickaway county*, 1 Ohio, 375, that a final judgment in the court of common pleas could not be altered, in any matter of substance,

McVickar v. Heirs of Israel Ludlow.

at a term subsequent to that in which it was rendered ; but we do not know of any case that restrains the court of record from altering, or setting aside a judgment improperly entered, at any time during the term in which it was rendered while the proceedings are considered as being in paper. Such a power seems to be necessary to the correct administration of justice. In the hurry of business, many entries are made, which require to be amended, or erased, and a discretionary power, exercised by the court, to correct the journal in such cases, prevents much error and expensive litigation. The form in which applications of this kind are made, depends chiefly on the rules and practice of the court. In this case the judgment was by default, and was set aside on motion, without the formality of filing written reasons, which we believe is the usual mode of setting aside judgments of that character.

The second inquiry leads to an examination of the *scire facias*, on which the plaintiff prays for judgment. This proceeding is founded on section 27 of the act of 1824, regulating judgments and executions ; and although the section does not prescribe the form of the process, yet it is sufficiently explicit, when taken in connection with its object, and the general rules of process and pleading, to enable us to decide without difficulty, what averments it ought to contain. Writs of this description are entered on the record, with a mere formal charge, in the caption and conclusion, as the declaration in the cause. They must, therefore, contain everything that is required to constitute a good declaration ; or, in other words, they must set out all the facts that are necessary to show a right in the plaintiff to the relief prayed for. The question then arises, does the record before us contain these requirements. The statute, as far as it governs the case, is explicit. It limits the remedy to judgments that are unsatisfied. It authorizes the procedure only after the time allowed by the court for the settlement of the estate shall have expired. It requires the writ to be set forth, that the defendants hold lands *by devise, [249 or descent, of the testator, or intestate, and the defendants must be called on to show cause, if any they have, why the judgment should not be levied of the lands so by them held. It was, therefore, incumbent on the plaintiff, in setting out his title, to aver that his judgment was unsatisfied, and that the time allowed by the court, for the settlement of the estate, had expired. On these points, the record is wholly silent.

McVickar v. Heirs of Israel Ludlow.

The averments may be all true, and yet the debt may have been paid, or the time allowed to the administrators may not have expired. The *scire facias* contains an averment, that lands descended to the defendants from their ancestor, but what lands, or of what value, or whether they are now held by the heirs, subject to an execution, or not, does not appear, either in the writ, in the return, or in any part of the record. And if a judgment should be rendered in this case, there is nothing to guide the officer in making his levy; or if the lands descended have been sold, under such circumstances, as to place them beyond the reach of the judgment creditor, there is nothing from which the value of the assets descended can be ascertained. Although the statute is silent on this point, yet the nature of the claim set up, and the uniform practice of courts in similar cases, require that the lands which have descended, should be set out in the body of the writ, or ascertained and described in the sheriff's return. The latter course seems to be the practice of the courts of Westminster.

The propriety of ascertaining the lands, or their value, will appear from this consideration, that the heir is not answerable, beyond the amount of assets descended, and it may be that he has paid other claims against his ancestor, to the amount of the assets, which came to him by descent. *Buckley v. Nightingale*, 1 Stra. 665.

But as no rule has been established by this court on the point now under consideration, and as it is not necessary to settle it, in order to decide the case in hand, we will leave this part of the subject open, and dismiss it for the present, with one additional observation, that the plaintiff must see, that in some part of the proceedings, the assets are shown which have descended to the heirs, so that an issue may be formed, and the matter reduced to a certainty.

250] *Another defect is, that the *scire facias* does not show, that the assets, in the hands of the administrators, have been exhausted. Until this is the case, the real assets can not be made liable. It is contrary to the general policy of our laws, to subject real estate to execution for debt, until the personal property has been disposed of; and this principle applies as strongly in favor of heirs, charged with the debts of their ancestors, as in any other case, and perhaps more so. Before the lands of a defendant can be taken in execution in payment of his own

Edmiston v. Edmiston.

debt, it must appear by the official return of the sheriff, that there are no goods and chattels to be found within his bailiwick. This is required by statute, and can not be dispensed with, in this or in any other case. For anything that appears, the administrators may have assets in their hands, that can be reached without difficulty. The record does not contain any averment inconsistent with this supposition.

This is a fact that must not be left in doubt. It is a necessary part of the plaintiff's title, without which he can not recover. If there be personal assets, he must pursue them, and if there be not such assets, he must ascertain the fact by the return of process, and distinctly state it as one of the grounds of his right to call on the heirs.

Inasmuch, then, as the record does not show that the judgment against the ancestor of these defendants is in force, and unsatisfied, or that the time allowed by the court for the settlement of the personal estate had expired, before the issuing of the writ of *scire facias*, or that the personal property which came to the hands of the administrators had been exhausted, the plaintiff can not be entitled to the judgment for which he prays.

Judgment below affirmed.†

*EDMISTON v. EDMISTON.

[251]

Scire facias from the court of common pleas, to subject lands to sale on the judgment of a justice, can not be issued unless the transcript from the justice shows that an execution was returned "no goods," and a suggestion made that the defendant owned land.

THIS case came before Judges BURNET and SHERMAN, at the July Term, 1826, in the county of Clark.

A transcript of a judgment rendered in favor of the plaintiff before a justice of the peace, was forwarded to the clerk of the court of common pleas, on which a writ of *scire facias* issued, re-

†NOTE BY THE EDITOR.—See amendment of judgments, note to case on page 31 of vol. ii. Averments in *scire facias*, see also ii. 251; iv. 397; v. 312, 340, and cases cited; viii. 209; xv. 301.

Edmiston v. Edmiston.

quiring the defendant to show cause why execution should not issue against his lands and tenements, to which a demurrer was regularly filed, on the ground that neither the transcript nor the *scire facias* contained any suggestion or averment that the defendant had lands and tenements, of which the debt could be made. Before a joinder in demurrer was filed, or a rule for joinder taken, the court overruled the demurrer on motion.

MASON, for the plaintiff, assigned for error the want of a suggestion, that defendant had lands and tenements, and also the overruling of the demurrer on motion.

JEWETT, for defendant, contended that the suggestion was useless—that it was not necessary to put it on record, and that the fact might be put in issue by a special plea.

By the COURT :

The remedy pursued in this case is given by statute; it is therefore necessary to follow the course which it prescribes in every material point.

In order to entitle the plaintiff to have recourse to this proceeding, two things are necessary: first, that goods and chattels can not be found within the jurisdiction of the justice; and, secondly, that the defendant has lands and tenements within the county. The first is to be ascertained by the return of an execution, and the second by a suggestion made to the justice. Whatever may be the opinion of counsel as to the utility of attending to these requirements, it is enough for us to know that the legislature have directed them, and have expressly made them the foundation of the jurisdiction of the common pleas. The *scire facias* can not be resorted to until an execution has been returned *nulla bona*, and a suggestion made to the justice that the defendant has lands and tenements within the county.

When this has been done, it is his duty to send a transcript to the clerk of the court, who is required to file it and issue the writ. Unless the transcript set out these facts, the clerk can not know officially that a *scire facias* is either required or authorized, and unless they are set out in the *scire facias*, which ought to contain the substance of the transcript, the court of common pleas can not know judicially that the case is within their jurisdiction. It is a general rule, that every record must present a case apparently

Edmiston v. Edmiston.

within the jurisdiction of the court, and when the jurisdiction is specially given by statute, and is to be resorted to only on the occurrence of particular facts, those facts must be shown, for however correct it may be to presume jurisdiction, where the want of it does not appear, in cases within the general jurisdiction of the court, yet where the jurisdiction is created by statute and limited to particular cases, of which the court could not take cognizance without the statute, the jurisdiction can not be presumed. If the facts on which it is made to depend are not averred, the party does not bring himself within the jurisdiction, and he can not resort to the statute for aid, because his record does not contain the case provided for by the statute.

The maxim, *est boni judicis ampliare jurisdictionem*, does not apply to courts of a limited jurisdiction, much less to cases of which the jurisdiction is wholly dependent on statutory provision. It would be a *malus judex* who would thus apply it, as it would confound a distinction, without which there can be no limits to the power of courts. It can not be necessary to advert to the uncertainty and inconvenience that would follow the practice contended for by the defendant.

We know that transcripts are taken for various purposes. Plaintiffs have always a right to require them, as well before as after execution; consequently, if the clerk may *issue a [253 *scire facias* on a transcript that does not contain these averments, a plaintiff may, in every case, proceed against real estate, although there may be goods and chattels sufficient to satisfy the judgment.

In relation to the second assignment, it has been intimated by counsel that the record does not fairly represent the proceedings of the court; but we can not listen to such a suggestion. We must take the record as we find it; and as it is, it shows a proceeding not warranted by law, or the practice of this state. When a demurrer has been regularly filed, a joinder becomes necessary, in order that an issue may be made to the court. It is irregular to dispose of the demurrer on motion in this summary way.

Judgment reversed.†

†NOTE BY THE EDITOR.—Judgment may be taken at return of *scire facias*, without rule on defendant to plead, iv. 135. Execution goes against chattels and lands, xliv. Ohio L. 48, sec. 3. Lien attaches to defendant's land from time of award of execution, ib. sec. 4.

Wilson v. Holeman.

WILSON v. HOLEMAN.

Bond for appeal given after verdict and before judgment. Appeal dismissed.

THIS case came before Judges BURNET and SHERMAN, at the July Term, 1826, in the county of Union.

The cause had been brought up by appeal from the common pleas. It appeared from the record that a verdict had been rendered for the defendant, at the May term, 1821, and notice of appeal then entered. On the 4th of June, the appellant gave bond, with a condition that he would prosecute his appeal to effect, and not depart the court without leave, and would pay the amount of cost and condemnation money, if a decree or judgment should be rendered against him. Final judgment was rendered on the verdict, in the common pleas, at the July term following.

The appellee moved to dismiss the appeal, on the ground that it had not been taken in conformity with the statute.

By the COURT:

The right of appeal from the common pleas to this court, for the 254] purpose of having another trial on the merits, is *given by statute, and extends only to cases in which judgments or decrees have been rendered, and the plain construction of the statute requires that the judgment or decree must be rendered before any steps are taken to perfect the appeal. The appeal is allowed from judgments and decrees.

The notice, which is the first step to be taken, must be entered on the records of the court at the term in which judgment is rendered, and bond with security must be given within thirty days after the close of that term. In this case, it appears that notice was entered and the bond executed before the term in which judgment was rendered. The bond is also defective.

It does not describe or set out the suit with sufficient precision to determine with certainty to what case it was intended to apply. As this suit, therefore, is not within the original jurisdiction of this court, and the steps required in order to give us appellate jurisdiction have not been taken, the appeal must be dismissed.

A motion was then made to enter judgment against the appellant

Murphy v. Lucas.

for costs. This motion was overruled, on the ground that the cause was not within the jurisdiction of the court, and, consequently, that no judgment could be rendered for or against either party. Appeal dismissed.

*MURPHY v. LUCAS.

[255]

In forcible entry and detainer, bill of exceptions not good, tested by a bystander.

The complaint, in forcible entry and detainer, must contain a specific description of the property.

THIS case came before Judges HITCHCOCK and BURNET, at the April Term, 1826, in the county of Pike.

It was a writ of error to reverse the judgment of the court of common pleas, rendered in a case of forcible entry and detainer, certified to that court by the justices before whom it was tried.

CREIGHTON and BOND, for plaintiff in error.

CLOUGH and DOUGLAS, for defendant.

The errors assigned were:

1. The proceedings show no definite description of land, for which a restitution could issue.
2. The process is directed to the sheriff, but returned by the coroner.
3. The proceedings were not in the township in which the land is situate.
4. The verdict is not in the form prescribed in the statute.
5. The matters set out in a bill of exceptions taken to certain proceedings before the justices and certified by a bystander.

By the COURT:

The second, third, and fourth errors are not sufficient to reverse the judgment. It appears that the sheriff, to whom the process was directed, died between the test and the return. The coroner was, therefore; the proper person to execute and return it. The statute does not require the proceedings to be had in any particu-

Murphy v. Lucas.

lar township, but gives jurisdiction to any two justices of the county in which the land is situate, leaving them at liberty to try the cause in any township within the county, as may be most convenient.

The verdict is in these words: "We, the jury, find the defendant guilty in said suit of forcible entry and detainer."

256] The statute directs, that if the jury find the complaint true, "they shall return a general verdict of guilty, or they shall return a special verdict of such parts as they do find true."

Perhaps the order in which the jury have placed the words composing their verdict, might be improved, but we think it conforms substantially to the requirements of the statute. It may be taken as a general verdict of guilty, with an unnecessary description of the case in which it is found, or, by transposing a single word, the jury find the defendant in said suit guilty of forcible entry and detainer, or, by rejecting the words "*in said suit*," as surplusage, the same result will be produced.

The plaintiff can not avail himself of the fifth error, because there is no law in this state authorizing bystanders to allow or certify bills of exceptions, and if there had been, an allowance by a single bystander, interested in the cause, as was the fact in this case, would not have been sufficient.

But the first error seems to be a fatal one.

The complaint before the justices was "for forcibly entering upon, and detaining possession of, the lower part of a tract of land situate on the bank of the Scioto river, opposite Piketon, the same being patented to the complainant by a patent from the President of the United States, bearing date March 2, 1821."

The complaint is in nature of a declaration. It must give a venue, and must describe the premises with such certainty as will apprise the defendant of what is demanded of him, and as will afford a guide to the sheriff in executing the writ of restitution. In this case, it does not appear in what township or county the land is situate, nor how much of the entire tract is demanded.

The judgment and writ of restitution must pursue the complaint, and, consequently, the sheriff must be directed to restore to the complainant the lower part of a tract of land on the bank of the Scioto river, opposite Piketon. This description forms no guide to the officer; it does not direct him how to find the entire

 Davis v. Mathews.

tract, nor what quantity of it he is to restore after it is found. The lower part of a tract, without metes and bounds, or quantity of acres, is too vague *and indefinite. It neither contains [257 certainty, nor the means of arriving at certainty.

Judgment reversed.†

 DAVIS v. MATHEWS.

In slander, plea of justification is bad on demurrer if it do not distinctly admit the speaking of the words.

This action came before Judges HITCHCOCK and BURNET, at the April Term, 1826, in the county of Pike.

The declaration set out sundry words spoken by the defendant, charging the plaintiff with the crime of perjury. The defendant justified, and the plaintiff filed a general demurrer to the plea.

In the court below, the demurrer had been overruled, and issue made upon the plea, a verdict and judgment rendered, and an appeal taken to this court.

By consent of parties, the record was amended by withdrawing the replication and issue, and reinstating the demurrer.

The plea contained a full and technical averment of the truth of the words charged in the declaration, but did not aver, or confess that the defendant had spoken them.

MURPHY and BOND, for plaintiff, cited 1 Chitty, 511.

DOUGLAS, for defendant, contended that what was not denied by the plea was admitted, and that the plea was sufficient notice of the ground of defense.

†NOTE BY THE EDITOR—Justice can not sign or docket bills of exception in forcible entry or detainer, xvi. 408.

One justice may try in forcible entry and detainer, and in detainer, xli. Ohio L. 78; without a jury, xlii. Ohio L. 4; and if jury demand its fee to be secured by demandant, xliii. Ohio L. 7. Constables may serve process instead of the sheriff, ib. Will not lie by purchasers at tax sales, xliv. Ohio L. 114; xlv. Ohio L. 24; also, at executor's, administrator's, and guardian's sales, xlviii. 34.

Davis v. Mathews.

By the Court:

The rules of pleading require, that special pleas in bar shall contain an answer to the whole declaration. The declaration in this case charges, that the defendant spoke and published the words set out, and avers that they were false and malicious.

258] *The plea avers that the words were true, but does not confess or deny the speaking of them. A material part of the declaration, therefore, remains unanswered, which could not be decided by any verdict that might be rendered in the case. It is immaterial whether the words be true or false, if the defendant did not speak them, consequently an issue on which that fact alone is to be decided can not settle the merits of the case, as it leaves the principal matter in controversy undetermined.

The ground taken by the defendant, that what is not denied by the plea, is admitted, is correct in many cases. In debt on bond, the plea of payment necessarily admits the making of the bond, because the defendant could not have paid it, unless it existed. So in trespass; a plea that after the trespass committed, the defendant tendered amends, etc., admits the trespass, because he could not tender amends for the trespass after it was done, unless it had been done. But in the case before us there is no allusion to the speaking of the words either in the commencement or close of the plea. It does not begin by all alleging that before the speaking of the words, charged in the declaration, the fact set out in the plea occurred, nor does it close with an admission, that for the cause aforesaid he spoke the words, as he had a right to do, nor is there any connection between the truth, or falsity of the words, and the fact of speaking them. The jury must find the words either true or false, and in neither case could it be inferred that the defendant did, or did not speak them.

The notice relied on by the defendant is good as far as it goes, but it falls short of the point to which it ought to extend.

Approved precedents are good evidence of what the law is, on points of practice and pleading, and it is always safe to pursue them, as well in form as substance.

We believe that no form of a plea of justification of slanderous words can be found in any approved collection of entries, or precedents, that does not aver the subject matter of the plea to have taken place before the speaking of the words, and that does not

McVickar v. Ludlow's Heirs.

also expressly and distinctly confess the speaking. Such are the forms in Lilly, Morgan, Richardson, and Chitty.

Demurrer sustained.†

*MCVICKAR v. LUDLOW'S HEIRS.

[259

After appearance of defendant, and continuance of the cause, it is error to dismiss it because the writ was not indorsed by security for costs. In such case, a rule should be taken to enter security.

THIS was a writ of error to the common pleas of Hamilton county, tried before Judges HITCHCOCK, BURNET, and SHERMAN, at the May Term, 1826.

GAZLAY, for the plaintiff, assigned for error:

That the court below had improperly dismissed the writ for want of security for cost.

The case presented by the record was this: The writ was tested on the first day of September, returnable to the December term, 1823. At the return term, a rule was taken for plea, and the cause continued to April term, when security for cost was entered and judgment taken by default. The judgment was afterward opened on motion, leave given to plead, and the cause continued to August term. At the August term the writ was dismissed on motion, on the ground that security for costs had not been given according to the statute, and judgment entered against the plaintiff for cost. The writ of error was taken to reverse this judgment.

By the COURT:

Section 10 of the practice act, in force in 1823, required "that in all cases of mesne process, where the plaintiff doth not reside, or is not a freeholder in the county, the writ shall be indorsed by some

†NOTE BY THE EDITOR.—Proofs, by defendant, under general issue in slander, iii. 270; v. 225; xvi. 88. Plea of justification in slander, unsupported by proof, on trial, aggravates the damages, v. 225.

McVickar v. Ludlow's Heirs.

freeholder, resident in the county, as security for costs, before the sheriff shall serve the same."

As the plaintiff was a non-resident, and had no freehold in the county, it was incumbent on him to procure an indorser, and until that was done, the sheriff ought not to have served the writ. But in this particular, we consider the statute as directory. The service, although unadvisedly made, was nevertheless valid, and if the defendant saw proper to waive his security, the proceedings on the writ, if in other respects regular, would be legal. The want of an indorsement for cost could not be considered as error. But the 260] negligence of the officer did not deprive *the party of his legal right. It was competent for him to claim it after the service and return of the writ, by an application to the court for that purpose, either at the first, or at any subsequent term, before final judgment.

Without undertaking to decide, whether or not it would have been regular for the court to have quashed the writ at the return term, we have no hesitation in saying that it was erroneous to do so under the circumstances of this case. The defendants by appearing, submitting to a rule for plea, and a continuance of the cause, acquiesced in the irregularity of the service. They had put the plaintiff off his guard, and could not afterward avail themselves of the statute, unless on motion, and a rule for security, within such time as the court might think reasonable.

A different construction would be inconvenient, expensive, and vexatious. But in this case, the plaintiff voluntarily furnished an unexceptionable indorser, before the objection was taken, and probably before the defendants had ascertained whether security had been given or not. The object of the provision had been fully accomplished, and the parties interested were in as good a situation as if the law had been literally complied with. The course taken was, therefore, unnecessary and not warranted by the statute.

Judgment reversed, and the cause remanded for further proceedings.

Baird v. Shepherd—M'Cutchen v. Keith.

*BAIRD v. SHEPHERD.

[261]

Time enlarged for performing decree in chancery.

In chancery, before Judges HITCHCOCK and BURNET, in Adams county, May, 1826.

By the decree rendered in this cause at the last term, the complainant was required to execute and deliver to the defendant a bond, with approved security, to indemnify him against certain covenants of warranty, which he had made in the sale of the property in controversy. The complainant was directed to execute and deliver the bond within a specified time, in order to entitle himself to the benefit of the decree.

The facts of the case were, that the bond was executed in conformity with the decree, but was deposited in the clerk's office, instead of being delivered to Shepherd.

GRIMKE and FITZGERALD now moved for a rule to enlarge the time limited in the decree for the delivery of the bond, and cited 2 Mad. Ch. 493, 495, 496, 524, 525. The motion was granted on terms—allowing the defendant the same time to pay the money after the present term, and ordering interest to be calculated from the same day in reference to the commencement of the present term, as was provided in the original decree in reference to the commencement of the last term.

Motion allowed.

*M'CUTCHEM v. KEITH, ASSIGNEE.

[262]

Under the act of 1810, bond for the conveyance of town lots, to which no value is affixed, can not be sued upon by assignee in his own name.

BEFORE Judges HITCHCOCK and BURNET, in the county of Adams, at the May Term, 1826.

This was an action of covenant brought in the name of Keith, assignee, on a bond conditioned for the conveyance of two town lots, to which no value or price was affixed.

M'Cutchen v. Keith.

Judgment was rendered in favor of the plaintiff, in the court below, and a writ of error taken to this court.

The error assigned was, that the bond was not negotiable, so as to authorize a suit in the name of an assignee.

By the Court:

The obligation in question was assigned under the statute of 1810, which provides that all bonds, promissory notes, bills of exchange, foreign and inland, drawn for any sum or sums of money, or other property certain, and made payable to any person, or persons, or to his, her, or their order, or unto bearer, shall be negotiable by indorsement thereon, so as absolutely to transfer and vest the property thereof, etc.

It also authorizes the assignee to institute and maintain an action in his own name. By the construction which we have uniformly given to this statute, it has been restricted to instruments drawn for a sum or sums certain, payable in money or property. We have believed this to be the fair interpretation of the act, and the only one that would give effect to the apparent design of the legislature. The certainty required can not relate to the species of article to be delivered, or paid, whether money or property, but to the numerical value, in that description of money for which judgment is to be entered. On any other interpretation, the restriction would be useless, as it would not prevent that uncertain kind of speculating traffic, in which the parties must be ignorant of the real value of the instrument which is the subject matter of their contract. To prevent this evil, the English courts have confined the statute 3 and 4 Ann, to notes for the payment of money *absolutely*, to the 263] exclusion of such as are contingent either in whole *or in part. The assignment of the obligation in this case could not vest in the assignee an absolute right to demand or recover any certain sum, as the value of the lots was not fixed, and could not be ascertained without the verdict of a jury.

Judgment reversed.†

†NOTE BY THE EDITOR.—See note to Byington v. Geddings, ii. 227.

Lessee of Spencer, etc. v. Marckel.

LESSEE OF SPENCER, ETC. v. MARCKEL:

Equitable title, accompanied with possession, can not be set up against the legal title in ejectment.

Notice to quit not necessary before ejectment brought.

THIS case came before Judges BURNET and SHERMAN, in the county of Delaware, at the July Term, 1826.

It was an action of ejectment, and was submitted to the court on the following agreed case: "Jonathan Dayton, the ancestor of the lessors of the plaintiff, contracted by parol to sell the land in question to defendant. The contract of sale contained no stipulation as to the possession, but defendant took possession, claiming to hold under said Dayton. For the purpose of this suit, it is admitted that the purchase money has been paid by defendant. No notice to quit was given, previous to the commencement of this suit. If the court shall be of opinion, that payment of the purchase money, and compliance with the said contract of sale, can be set up as a defense in this suit, or if the court shall be of opinion that notice to quit was necessary, then the plaintiff is to become nonsuit. Otherwise judgment against defendant."

WILCOX for plaintiff, contended that an equitable title can not be set up, in an action of ejectment, against the legal title. That relation of landlord and tenant must exist to render notice to quit necessary. 2 Johns. 84, 444. That a person in possession of land, who claims to hold in fee, is not entitled to notice to quit, previous to bringing an action of ejectment, but there must be a tenancy or existing relation of landlord and tenant. 3 [264 Johns. 422. That a permission by the owner to occupy, will not create a tenancy requiring notice, 13 East, 210; 2 Taunt. 149; 2 Camp. 505; Esp. 717; and that all the notice necessary in this state is the ten days required by section 59 of the judiciary act.

BRUSH, for defendant, contended:

That wherever a right of entry exists, and the interest is tangible, so that possession can be delivered, ejectment lies. 9 Johns. 298. When a person claims to recover on the ground of prior

Lessee of Spencer, etc. v. Marckel.

possession, that possession must be clearly proved. 3 Johns. 388. The payment of taxes, and the execution of partition deeds are not evidence of an actual possession. Ibid. An equitable claim, which is *doubtful*, can not prevail against the legal estate. 2 Johns. Cas. 321. A lessor in ejectment ought to have a subsisting title, interest in the premises. 4 Johns. 483; 10 Johns. 368.

If the plaintiff has the legal title, defendant can not set up an equitable title, as a bar. 2 Johns. 221; 2 Johns. Cas. 321; 8 Johns. 487; 3 Johns. 422. The only way in which an equitable title can be assisted at law is, by allowing the presumption in certain cases to prevail, that there has been a conveyance of a legal estate. 2 Johns. 221.

He also contended that the action could not be maintained without notice to quit. 9. Johns. 330; 6 Johns. 46.

By the Court :

The first question presented in this case has often occurred on the circuit. Several cases have recently been tried, in which it was determined that an equity can not be set up as a defense against the legal title, in an action of ejectment. The principle on which those cases were decided, is in conformity with the rule now settled at Westminster, and is supported by the authority of decisions in many of the states. The cases cited in the argument are full to the point. We believe the safest general rule that can be adopted, is, to leave the equitable claimant to assert his right in a court of chancery, and were we at liberty now to consider this question as 265] open, we should feel bound both by *precedent and expediency, to decide it against the defendant.

The general rule in England, in relation to notice, seems to be this: that no person is bound by law to give notice to another of that which such other may otherwise inform himself, except such notice be directed by act of Parliament. In ordinary cases no notice is necessary to the person against whom there is a legal demand, before the commencement of a suit for the recovery of that demand, because he is bound to do his duty, and to take notice of his peril, that he will be held responsible for the omission of it. In this case the defendant went into possession without a legal title, and without any authority from General Dayton, under whom the lessors of the plaintiff claim. He may, therefore, be considered in the light of an intruder, rather than as a person standing in the relation of a tenant to his landlord. Viewed as a purchaser, he

Lessee of Spencer, etc. v. Marckel.

does not come within the scope of the general rule; he has relied on his contract, and he can not be presumed to be ignorant of the law by which it is governed. He is therefore to be considered as having taken possession at his own risk, and bound to take notice of all the consequences resulting from his own act. He may be compared to the locator of a Virginia land warrant, who acts on his own information, takes on himself the whole risk of title, and is not protected by an averment of want of notice.

But it is not necessary to investigate this point, with a view of showing that this case does not come within the class of cases in which notice has been held necessary by other courts. The doctrine of notice to quit, as it is applied in actions of ejectment, depends on statutory provisions, and on rules of courts, which have often been changed, and differ materially in different tribunals. The only notice required by the laws of this state, is a notice of ten days to the tenant in possession, before a plaintiff in ejectment can proceed to judgment against the casual ejector. This notice has been considered as legally given by the service of the declaration with the common notice attached, ten days before the first day of the term to which it is returned.

*We have no rule requiring any other, or different notice, [266 and have never considered the rules adopted by other courts, or prescribed by the legislatures of other states or countries, as obligatory here.

Judgment for the plaintiff.†

†NOTE BY THE EDITOR.—That equitable title is no defense in ejectment, see also, i. 243; iii. 232; vi. 476; xi. 334; xiii. 260; xvi. 485; xiv. 307.

That no other notice than the statutory service of the declaration, in ejectment, is necessary, see also xvi. 485, where the case of *Spencer v. Marckel* is reaffirmed.

An equitable title alone will not support an action of ejectment, xiii. 260. A person having equitable title, accompanied by a right of possession, may defend in ejectment, xvi. 485. Equitable title, with a right growing out of a previous possession, will support ejectment, xviii. 323.

266]

*HOOD v. BROWN AND BENTLEY.

Mortgage executed in January, 1821, for the purpose expressed of keeping the property out of the reach of a creditor who had sued, kept by mortgagor in his own possession until 1823, and then delivered and recorded, can not overreach the lien of a judgment obtained in July, 1821.

THIS cause was heard before Judges PEASE and BURNET, in the county of Trumbull, at the August Term, 1826.

The governing facts in the case were these: In January, 1821, Bentley and wife executed a mortgage of the premises in question to the complainant, for the ostensible purpose of securing debt. The reason given for executing the mortgage at that time was, that the United States were about to commence a suit for a large amount against a private banking company, of which Bentley was a member, and liable by the law of this state to the payment of the demand. He retained the mortgage deed in his possession till the summer of 1823, during which time he exercised acts of ownership, leased a part of the premises, for the term of twenty years, to H. Stephens, informing him at the time that he had executed a mortgage to Hood, but that he held it in his possession, and did not intend to record it, unless the United States should recover a judgment. At the same time he informed Stephens, that the defendant, Brown, had a suit pending against him; that it was necessary to hasten the arrangement, for if Brown should get a judgment it would bind the property. In the summer of 1823, Bentley sent the mortgage to Philadelphia, to be delivered to Hood, on condition that his creditors would give him a general release, which it appears was never executed; the mortgage, however, was delivered, and was recorded shortly after.

267] *In July, 1821, Brown recovered a judgment against Bentley and Quimby for two thousand three hundred and ninety-two dollars; in August he issued a *fi. fa.*, which was returned, by his directions, without service, at which time there was personal property in Bentley's possession, estimated by one witness at eight hundred dollars. This property was alleged to be embraced in a previous assignment for the benefit of creditors. An alias execution issued in October, 1823, which was levied on the mortgaged

Hood v. Brown and Bentley.

premises, by virtue of which they were sold, and purchased by the defendant, Brown, for five hundred and sixty-seven dollars. Brown denies notice, admits he heard rumors that Bentley had executed conveyances of his property, which were retained in his possession, to be delivered, or not, as circumstances might dictate.

The object of the bill is, to avoid the sale and conveyance of the premises to Brown, and to obtain a sale for the benefit of the complainant.

WHEELER, for complainant, contended that the mortgage deed took effect from its date. That Brown was bound to exhaust the property not held by the mortgage. That a deed made without the knowledge of the grantee, is good, and that if there was fraud in the transaction, the complainant had no knowledge of it. He cited 2 Vent. 198; 1 Binney, 513; 5 Mass. 51; 12 Mass. 556; 9 Mass. 307; 2 Mass. 447; 12 Johns. 536; 18 Johns. 544; 1 Johns. 288; 3 Atk. 646; 1 Ves. 64; 10 Johns. 460; 7 Mass. 381; 4 Johns. 416.

STONE, for defendant, insisted that the deed took effect only from the delivery. That the transaction, on the part of Bentley, carried fraud on its face. That the judgment of Brown had the prior lien. That the condition on which Bentley authorized the mortgage to be delivered, has never been performed, and that the personal property, referred to by one of the witnesses, had been assigned by Bentley, before the recovery of Brown's judgment. He cited 4 East, 481; 2 Johns. 234; 4 Johns. 233; 10 Mass. 466; 3 Johns. Ch. 516.

*By the COURT:

[268

The mortgage set up by the complainant, though executed in January, 1821, remained in the possession of the mortgagor, without any attempt to perfect it by a delivery, till some time in the summer of 1823. The judgment under which Brown purchased and claims the premises was obtained in July, 1821, and by the statute of the state, was a lien on the lands and tenements of the defendant from the first day of the term in which it was rendered. In order to overreach this judgment, it has been strenuously contended that the deed took effect from its date, and operated as a

Hood v. Brown and Bentley.

lien on the premises from January, 1821, which was anterior to the term in which the judgment was had. The authority principally relied on, to support this position, is the case of *Wilt v. Franklin*, 1 Binney, 502, in which it was decided by a majority of the court that the deed executed by Keely to Bartholomew should take effect from its date, so as to overreach a judgment rendered against Keely, after the execution, and before the delivery of the deed. There is, however, a striking difference between the facts of that case and of the one before us.

The deed by Keely was made for the benefit of all his creditors; it was retained in his possession only a few days, which was in part accounted for, by the fact that the grantee resided in the country, at the distance of about thirty miles. In this case the mortgage was for the benefit of a single creditor; it was kept in the hands of Bentley nearly three years, subject to his disposal. It was made for the avowed purpose of placing the property beyond the reach of one of his creditors. It was not his intention to deliver it, unless that creditor attempted to enforce his claim, and Bentley treated the property, during that time, as his own, exercising acts of ownership, and leasing a part of it for the term of twenty years. Whether the distinguishing facts of that case, led the court to determine that the operation of the deed should relate back to its execution, or not, we do not know, but if it was intended to adopt the principle set up by this complainant, we are constrained to declare that we can not recognize that case as a rule of decision in this state.

269] We consider the law to be well settled that deeds are to *take effect from delivery, wherever the rights of third persons are involved. The doctrine of relation exists only between the immediate parties to the transaction. It is founded on a legal fiction, intended to prevent, not to promote injustice. As when a deed is executed and delivered as an escrow, if the grantor die before the performance of the condition, yet when the condition is performed, the grant shall relate back to the date, so as not to be defeated by the death of the grantor. And in a similar case, if the grantor be a *feme sole*, and marry before the performance of the condition, the same relation shall take place, and for the same purpose. But these, and similar cases, are not considered as affecting the general rule. They may be considered as exceptions, or as constituting a

separate class of cases, resting on a different principle. It is not necessary to examine the authorities applicable to this point. Those cited on the part of the defendant sufficiently establish the doctrine, and it is plainly inferable from most of those relied on by the complainant. The circumstances of this case are not such as to take it out of the general rule. They are rather calculated to illustrate the propriety of the rule, by showing the fraudulent purpose that might be accomplished, were it not in existence. Without it, a debtor might execute a deed of all his real estate, and place it in his desk, to be used as circumstances might require, and when pressed by judgments, might deliver it to the grantee, as a deed overreaching the whole of their liens. This was, at least partially, the avowed object of this mortgagor. He declared to Stephens and others that the mortgage was under his control, and that he did not intend to use it, unless the United States pressed for their claim.

In this point of view the transaction was tainted with fraud, though it is not necessary, for the purposes of this decision, to consider it in that light. It is sufficient to say that the instrument operating from its delivery, did not take effect till the summer of 1823, and, consequently, that the judgment in 1821 has the prior lien.

We recognize the doctrine of marshaling assets, when justice and equity require it, but on this subject it is sufficient to say that if the personal property had been incumbered, *the whole [270 amount of its estimated value, added to the proceeds of the real estate sold under the judgment, has not satisfied more than a moiety of the debt. The principle, therefore, can not be applied in the present case.

It is also admitted that a deed executed without the knowledge of the grantee may be good, when it is not impeached by other circumstances. And that whatever might have been the motives of this mortgagor, at the time of executing the instrument, the mortgagee does not appear to have been a participator in them. But exonerating him from a charge of fraud, is not sufficient to establish his claim. His innocence can not change the rules of law. If the transaction were free, both from moral and constructive fraud, the result would be the same. The deed as to the defendant, Brown, would take effect from its delivery.

Hood v. Brown and Bentley.

The bill, as to the defendant, Brown, must be dismissed with costs.†

†NOTE BY THE EDITOR.—That a delivery of a deed to a third person, without the knowledge of the grantee, may pass the title of grantor, see also xiv. 307. The lien of a junior mortgage first recorded, is preferred, although the junior mortgagee had actual notice of the senior mortgage when he took the junior, xiii. 148; xiv. 428; xvi. 533. And mortgages now take effect only from time of *delivery* to recorder, Swan's Stat. 568, sec. 13. Until so delivered, they are *not* mortgages, and are not "*executed*," xiv. 428; xvi. 533, and cases cited.

A mortgage delivered to recorder on the first day of the term of the court at which a judgment is rendered, and before the court convenes, is preferred to the lien of the judgment, xvi. 111, 533.

CASES

DECIDED BY THE

Supreme Court of Ohio

BEFORE ALL THE JUDGES,

AT A SPECIAL SESSION HOLDEN AT COLUMBUS, DEC., 1826.

R. F. SLAUGHTER v. JOHN HAMM.

Public officer who receives money to pay to a public creditor, and obtains a receipt for the whole upon the payment of a part, is liable for the residue, though no deception or fraud be practiced.

THIS was an action of *assumpsit* for money had and received, submitted to the court to decide upon the law and facts, and reserved for decision at Columbus, in Muskingum county.

The facts in the case were as follows: The defendant, in 1820, was marshal of the Ohio district, and was charged by law with taking the census, then taken under a law of the United States. The plaintiff was appointed his assistant to take the census in the county of Fairfield. On the 1st day of August he subscribed a written paper, engaging to perform all the duties required by law, "including an account of the manufacturing establishments and their manufactures, at the rate of one dollar and twenty-five

Slaughter v. Hamm.

cents for every hundred persons in said county, the marshal furnishing all the regulations, restrictions, forms, and interrogatories necessary." The district judge allowed the marshal two dollars and fifty cents per hundred persons for taking the enumeration of Fairfield county, which amounted to three hundred and thirty-272] six *dollars and sixty-six cents. This sum was paid to the marshal, and an additional sum of sixty-seven dollars and thirty-three cents for taking the account of manufactories and manufactures, amounting in the whole to four hundred and three dollars and ninety-nine cents.

On June 5, 1821, the plaintiff settled with the defendant, and gave his receipt for three hundred and thirty-six dollars and sixty-six cents, "being in full for taking the census of Fairfield county," and also for "twenty per centum upon that sum, being the allowance in full for taking an account of the manufactures in said county. The whole sum actually paid by the defendant and received by the plaintiff was two hundred and fifty-three dollars and forty-nine cents. At the time of receiving this sum and giving the receipt, the plaintiff was apprised of the amount received from the government by the defendant. The suit was brought to recover the difference between the sum paid to the plaintiff and that received by the defendant.

GODDARD, for the plaintiff:

A perusal of the act of Congress, providing for taking the fourth census, approved March 14, 1820, is necessary to a correct understanding of the case.

By the first section the marshals are authorized and *required* to "appoint one or more assistants in each county." The oath of the marshal is that he will "cause to be made" an enumeration, etc. The oath of the assistant, that he "will make" an enumeration, etc.

The marshal is not authorized personally to take the enumeration. His duties in relation to the census are specifically pointed out, and are to file returns with clerk, transmit the aggregate to secretary of state, etc.

His compensation for these services is fixed by section 4 at three hundred dollars.

By the same section the compensation of the assistants is fixed at one dollar for every one hundred persons (except in cities), "but where, from the dispersed situation of the inhabitants in some

Slaughter v. Hamm.

divisions, one dollar will be insufficient for one hundred persons, the *marshals*, with the approbation of the judges of their respective districts, *may make such further allowance* to the assistants in such divisions as shall be deemed an adequate compensation: Provided, the same **does not exceed one dollar and twenty-* [273 five cents for every fifty persons by them returned," etc.

This clause shows conclusively that the marshal himself was to have nothing more to do with the census than those specific duties before mentioned, for which he received three hundred dollars.

Section 10 authorizes the secretary of state to allow twenty per centum for taking an account of manufactures.

1. Is the contract binding upon the plaintiff so as to preclude him from receiving any more?

2. Does the receipt in full bar all inquiry into the actual amount received?

If, when the contract was made, the defendant intended nothing fraudulent, but fixed the sum of one dollar and twenty-five cents as what, from his knowledge of the density of the population in Fairfield county, he supposed would be a reasonable compensation, the plaintiff certainly would not be precluded from receiving the additional sum which the district judge afterward determined to be reasonable. This adjudication of the district judge was for the benefit of the assistants—not intended to swell a perquisite for the marshal. The contract was made in August, 1820; the determination of the judge was in March, 1821. Now, imputing to the defendant nothing unfair or improper, it is clear that the contract for one dollar and twenty-five cents was not to bar the plaintiff from the additional compensation certified by the judge; otherwise the marshal would have said to the judge, "This man has agreed to do the duties for one dollar and twenty-five cents. Any certificate of further pay to that county is unnecessary," and none would have been given.

The court are bound to impute absolute verity to the certificate of the district judge. They are bound to believe that two dollars and fifty cents per one hundred was a reasonable compensation for Fairfield county, and that nothing less would have been so. A contract for less would be a farming out of the business and a fraud on the government, its tendency being to cause that to be carelessly and negligently done, which the government intended should be faithfully done.

Slaughter v. Hamm.

There is considerable analogy between this case and those 274] where the action is brought to recover the excess of *interest taken upon an usurious bond. In the case of *Bosanquet v. Dashwood*, Cas. Temp. Talb. 38, it was held that the illegal interest could be recovered back, and that the principle of *particeps criminis* did not apply. I consider the language of the chancellor as particularly applicable here: "Nor can it be said, in every case of oppression, that the party oppressed is *particeps criminis*, since it is that very hardship which he labors under, and which is imposed on him by another, that makes the crime. The case of gamblers, to which this has been compared, is in no way parallel; for there both parties are criminal; and if two persons will sit down and endeavor to ruin one another, and one pays the money, if, after payment, he can not recover it at law, I do not see that a court of equity has anything to do but to stand neuter; there being in that case no oppression upon one party, as there is in this. *Must he keep money that he has no right to, merely because he got it into his hands?*" This case is cited with approbation by Lord Mansfield, and declared to be the rule of courts of law in the case of *Smith v. Bromley*, 2 Doug. 696, note. He there says: "If the defendant take advantage of the plaintiff's condition or situation, still the plaintiff shall recover." And again: "I am persuaded it is necessary for the better support and maintenance of the law to allow this action; for no one will venture to take if he knows he is liable to *refund*. Where there is no temptation to the contrary, men will always act right."

I will cite to the same purpose the case of *Jaques v. Golightly*, 2 Black. 1073, where it was held that "money paid as a premium for insuring lottery tickets may be recovered back, though the winnings (if any) can not be recovered, the contract being void by statute."

2. That a receipt in full does not preclude examination into the sum actually paid, I beg leave to refer the court to the following authorities:

Barret et al. v. Rogers, 7 Mass. 297. "A bill of lading is not conclusive evidence in all cases, as to the condition of goods shipped in packages."

Stratton v. Rastall et al., 2 Term, 366. "A receipt is not conclusive evidence against the party who signs it."

Slaughter v. Hamm.

*Middleditch v. Sharland, 5 Ves. 87. "Inquiry directed [275 into sum actually paid, though receipt in full given."

House v. Low, 2 Johns. 378. "A receipt may be explained by parol."

McKinstry v. Pearsall, 3 Johns. 319. "Evidence admitted to explain a written receipt."

Tobey v. Barber, 5 Johns. 68. "Parol evidence is admissible to explain or contradict the terms of a receipt."

Putnam v. Lewis, 8 Johns. 389. "Same point."

Newell v. Lawrence, 12 Johns. 531. "It has been repeatedly ruled in the Supreme Court that receipts may be explained, and even contradicted, by parol evidence. The grossest abuses and frauds might be practiced if bare receipts were to be deemed conclusive, and not open to examination."

No argument was presented for the defendant.

By the Court:

The act of Congress distinctly marks out and defines the several duties of the marshal and of his assistants. The compensation which each is to receive, is separately provided for, and they are in no way connected. No fraud can be properly imputed to the contract between the parties, by which the compensation that the plaintiff should receive, was fixed at one dollar and twenty-cents the hundred. At the time it was entered into, the sum which the district judge might determine to be reasonable was not known. That allowance was subsequently made, as well as the allowance of the secretary of state, of twenty per cent. for taking the account of manufactures. When these allowances were made, they were made for the assistant, and he alone was entitled to them. The marshal, when the money was paid to him, received it for the assistant, and not for himself. By receiving it, he became responsible that he would pay it to the plaintiff. He was, in fact, the plaintiff's debtor for the amount.

The case of the defendant is not that of an individual authorized by another to receive his money, and therefore held to account for it. He was the agent of the government, *acting in an [276 official character, and confided in by the government to pay a debt due from it for services performed. The honor, the integrity, the justice of the government required that the payment should be fairly and fully made.

Lytle v. Davies.

The fact that the plaintiff knew all the circumstances, at the time he received less than his due, and gave an acquittance, does not authorize the defendant to keep what never was his—what he never had any color of claim to keep. By what motives the plaintiff was influenced to give a receipt for money he did not receive, and to leave in the defendant's hands money he had a right to receive, we do not know. One thing, however, is certain: there is no pretense that the defendant gave any equivalent to the plaintiff. His claim to retain it rests upon the naked assent of the plaintiff that he might do so. A public agent, who retains any part of money, put into his hands to pay the debts of the government, by the assent of the creditor, is not in the situation of a man who voluntarily pays money, in the discharge of an alleged debt, where nothing is due. Such retaining is an abuse of the public confidence; and if the law should permit a public officer, guilty of this abuse, to secure profit to himself, by his misconduct, the mischiefs would be incalculable. The vexations that would be practiced to obtain a receipt for the whole, upon the payment of part, could seldom be made out in proof, while the receipt would always speak for itself. Were the principle once established, that in a case like the present, the defendant was secure in his gains, it would be proposing encouragement for public agents to practice frauds, both upon the government and its creditors. The public policy and the public justice are both opposed to such doctrine.

The plaintiff is clearly entitled to recover both the principle retained, and interest upon it.

Judgment for plaintiff.

277] *WILLIAM LYTLE, ADMINISTRATOR, v. S. W. DAVIES

Bond given for prison limits void, unless defendant is actually in prison, and that fact recited in the bond.

Joint bond for prison limits given in several separate suits, void.

THIS was a writ of error prosecuted by the plaintiff, who was plaintiff in the court of common pleas, to reverse a judgment rendered against him in that court, and was reserved in the Supreme Court of Hamilton county for decision here.

Lytle v. Davies.

The suit in the common pleas was an action of debt brought against the defendant, one of several securities upon a prison bounds bond.

The obligatory part was in the usual form. Wm. Lytle, administrator of A. St. Clair being the obligee. The condition was as follows: "Whereas, Jacob Baymiller has been arrested by R. Ayres, sheriff of Hamilton county, on three several writs of *capias ad respondendum*, returnable to the next Supreme Court, in favor of William Lytle, administrator, etc., amounting altogether to the sum of fifty-three thousand four hundred and nineteen dollars and thirty-five cents, and is in the custody of the said sheriff. Now the condition of the above obligation is such that if the said Jacob Baymiller shall well and truly stay and keep within the limits or bounds of the prison of the county aforesaid, as laid off by the statute in such case made and provided, until he shall be legally discharged by law, then this obligation to be void," etc.

The declaration was upon the obligatory part of the bond as upon an obligation for the payment of money, in general terms. The defendant cravedoyer of the bond and of the condition, and demurred generally, and the plaintiff joined in demurrer. The court of common pleas gave judgment upon the demurrer for the defendant, to reverse which this writ of error was brought.

The demurrer involved exceptions to the pleadings as well as to the validity of the bond itself. The general error was assigned, and the cause elaborately argued upon several points. But as the court decided upon the validity of the bond alone, only so much of the arguments as applied to that point are reported.

*WADE and HAYWARD, and HAMMOND, for the defendant, [278 objected to the bond:

1. That it did not show from what court the process issued, who was the plaintiff in the action, or when or where it was returnable.

2. That it did not specify within the bounds of what county the party arrested was to remain.

3. That it was a joint bond upon three several writs, when a separate bond, on each writ, ought to have been taken.

They argued that, although it had been adjudged that a prison bounds, or an appearance bail bond, not taken according to the

 Lytle v. Davies.

statute, was a good common law bond, there was no adjudication by which a bond like the present had been sustained.

All the cases which could be adduced, in English or American reports, were those, where the bond distinctly recited from what court the process issued, when it was returnable, and who was the plaintiff in the cause. Upon what occasion the bond was taken, and by what act, of the party arrested, the condition would be performed. The condition recited an authority to take the bond, and a proper case for taking it. But in this case there is no such recitation. The condition was altogether vague and uncertain. It did not appear from what court the process issued, or who was the plaintiff, or when or where the party was to appear. It did not appear where the party arrested was to remain in custody, nor did it appear for what sum he was liable upon each writ. The condition was not only vague and uncertain, but the proposition that the sheriff might demand one joint bond, for three distinct liabilities, from the same person, enabled him to practice oppression whenever he chose to do so.

HAINES and BENHAM, for plaintiffs:

We contend, first, that this bond complies *substantially* with the *requisitions* of our statute; and secondly, if not *good as a statutory bond*, it is good at *common law*.

First, it is good under the statute.

279] *In determining this question (as we must be governed, in some degree, by adjudicated cases upon bonds taken under the statute of 23 Hen. 6, c. 9), it became important to advert to the *distinction* between the forms to be observed under that statute and under that of Ohio, "regulating prison bounds," etc., in relation to which we refer to 1 Selw. 134 and 6 Bac. 180. The statute of 23 Hen. 6, "is directed against *oppression* on one hand, and an *improper indulgence* on the other." Consequently greater *strictness* is required under that statute than is to be expected under that of Ohio. As in this state, where the prison bounds bond is given direct to the plaintiff, there can be no such thing as "*oppression* or *improper indulgence*" on the part of the officer. We can know of no such thing as a bond void "*for ease and favor*" or "*a colore officii*." But, in England, it is not required "to set forth the *nature* of the *action* in the condition of the bond," if it set forth the parties, and the time and place of appearance substantially, though it be variant in other particulars,

Lytle v. Davies.

it is sufficient. Therefore, "a variance between the condition and process in the nature of the action, or of the time and place of appearance, does not vitiate." 1 Seld. 134; 2 Saund. 59, n. 3; Cro. Jac. 286. And in 2 Stra. 1155, the court said "that there were no *set form* of words for those bonds, but if in substance they appear according to the design of the writ, it is sufficient," etc.

For numerous cases cited upon this question, I refer to 1 Wheat.; Selw. 431, 432; 2 Saund. 59, n. 3, where all the English law upon this question is to be found.

It is settled, in the English cases, that it is not essential to the validity of the bail bond that such part of the act of Henry 6, as is only *directory*, should be complied with; "as if one surety is taken it is good, and not voidable by the statute." 1 Saund. 161, n. 1.

In the United States, we hold it to be well settled that a *substantial* compliance with the *provisions* of the statute is all that is necessary to give *validity* to a "statutory bond." That mere "*verbal* difference and departure from the provisions of the statute does not *vitate*," and that if a bond is taken in "a circumstance contrary to the provisions of the *statute (that is only prescribed [280 for the *direction* of the officer as to take sureties"), or, "if anything is required specially by the condition that the act only *imports* but does not literally *require*," that such variations do not hurt.

These principles are to be deduced from a great variety of cases, of which we will cite only a few. In the case of *Ralston v. Lane*, Hardin, 501, upon a appearance bail bond, the court decided "that as a bail bond makes a part of the sheriff's return, if there be such a correspondence between the writ and bond, that, by a *reasonable* intendment the bond *may* have been taken upon that writ it is sufficient. And further, that if *nice* and *technical* objections to bail bonds are indulged, few bail bonds will stand, and great mischief will be done, as they are generally taken by officers who are little versed in *technical* forms. It is necessary, therefore, to give them a *liberal construction* in furtherance of justice."

In same book, page 505, a bond was held sufficient, although "it did not state the nature of the action, the amount of damages, or that the plaintiff sued as assignee," etc. The court say, "that it is enough if a bail bond is *certain* to a *common intent*. And, as to the *bail*, they ought to make no objection, for it was their folly to execute the bond without knowing the amount for which they became bound," etc.

Lytle v. Davies.

These principles are recognized in other states of the Union.

In North Carolina, *vide* Rhodes v. Vaughan, 2 Hawks, 164.

In South Carolina, in 3 Des. 57, "a bond of the treasurer, etc., with three *sureties* where the statute required five persons or upward, was adjudged good."

In Tennessee, 4 Hayw. 216.

In Virginia, 2 Call, 290, it has been decided that "one forthcoming bond may be taken on several executions." These bonds present a strong analogy to bonds for the bounds, etc., and this case, and the case in 8 Johns. 111, where several executions were embraced in a prison bounds bond, answers the objection that three writs, etc., were embraced. The same principle is contained in the cases cited in the margin; and in 2 H. & M. 400, Judge 281] Tucker *observes, "that when a party obtains an indulgence upon certain conditions, the court will not regard trifling errors," etc. And again, in 1 Munf. 76, a prison bounds bond, given to the sheriff and his executors, administrators, etc., not to "his successors in office" (as the statute would require), was adjudged good, "as there was no form prescribed by the statute."

In New York we find the same doctrine as in 1 Johns. 521, that in appearance bail bonds "time and place need only be set forth substantially." And in 8 Johns. 86, in "a suit upon a bond for the jail liberties embracing *three* several executions," the bond was held *good*, and Ch. J. Kent, in delivering the opinion of the court, remarked, "that where there was no allegation or pretense of extortion or undue means exercised by the sheriff in procuring the bond, it is right and just that the obligors should be *concluded* by that acquiescence," etc.

In Massachusetts we find the same doctrine. In 10 Mass. 20, a bail bond was held sufficient, although "the names of both plaintiff and defendant were mistaken." And in the analogous cases upon replevin bonds these principles have been repeatedly recognized, as in 8 Mass. 147, when the bond was conditioned "that the plaintiff should prosecute at the next county court," it was held sufficient.

In 9 Cranch, 36, upon an "embargo bond, conditioned in more than double the value," etc., in the opinion of the court, by J. Story, the court say, "that as there was no allegation or pretense of fraud, the bond must be taken to be a voluntary *bona fide* bond, and that the obligors were *estopped* to deny that the penalty of

Lytle v. Davies.

such a bond was in double the value of the vessel and cargo." The court remarked, "that it would be *dangerous* in the extreme to admit the parties to *avoid* a *sealed* instrument by averring an error," etc. This is an important case, and overrules the case in 7 Cranch, 287.

And in 1 Ohio, 170, we find that it has been settled in this state, "that bonds comprising substantially all the requisitions of the statute are valid; and that it has been the uniform object of our courts to support such bonds," etc. We deem it unnecessary to amplify upon this question, as *we apprehend there can be [282 no doubt that this bond would be supported when tested by the most rigid rules applicable to statutory bonds. But we will merely add that the distinction between our bonds to the party and English bail bonds, and bonds in other states in the Union, when given to the sheriff, is an important one. With us there exists not the same reasons for applying the rules of the English law in relation to bonds taken under the statute of Henry 6, as with us these bonds can neither be *abused* to purposes of *oppression* nor *improper indulgence*, except by the construction contended for by the defendants. As in this state where the bond is given to the party, and the officer does not stand between him and danger (if *informalities* are permitted to vitiate), the officer could in all cases, by mere neglect of his duty, effect the escape of his prisoner, and the party would be without redress.

But again, if this bond is not obligatory as a statutory bond, it is good at *common law*.

We contend, upon undoubted principles of law, that independent of any statutory provisions the bond in question is valid, being neither "*malum in se*," nor "*malum prohibitum*." That where a way "may be found to perform the condition of a bond, without a breach of law, it shall be good." 1 P. Wms. 189, 190. In the English books, a *distinction* is taken between bonds given to the plaintiff, and bonds to the sheriff. The first are valid, although taken in an other form than that which the statute prescribes. See 2 Saund. 59, 60, notes; 2 Mod. 304; 2 Salk. 438. So a bond from one "to be a true prisoner and not to escape," is good. 1 Saund. 161. And in 10 Co. 99, we find the same principle.

In the United States the same principles are recognized. In New York, where the statute regulating jail liberties is similar to that of Hen. 6, the same rules prevail. In 2 Johns. 239, 244, a bond

 Lytle v. Davies.

"to remain a true and faithful prisoner," but differing *essentially* from the *directory* part of the act, was adjudged good; and the rule laid down, "that a bond, taken by the sheriff to induce a less rigorous imprisonment, is good, if the indulgence be such as the sheriff can grant consistently with his duty." "The statute is 283] *directed against oppression, on one hand, and improper indulgence on the other." This case was sanctioned by Judge Kent in 1 Caine, 459, in which it was settled "that a bond to indemnify against an escape, given after an escape, was good." The reason why a bond, to permit an escape, is void, is because it is to do an unlawful act; when the act is done, the reason falls.

The same principle is recognized in Pennsylvania, 6 Bin. 296-298, in a suit upon the bond of a prothonotary, not required by law. The court decide, that it "was valid at common law, as a voluntary obligation." 2 Str. 745.

In Massachusetts we find it repeatedly decided, "that a bond given by a debtor in execution voluntarily, without fraud, or imposition, conditioned that he will continue a true prisoner without escaping," is good at common law, although not in conformity to the statute of 1784. 7 Mass. 98, 423. Parker, J., 8 Mass. 380, remarks, that it has been determined, by this court, in two cases, that a bond given by a prisoner for debt, in which the penalty is more or less than double the amount of the debt and costs, in the execution, although not within the statute, so as to entitle the obligee, upon breach of the condition, to the whole penalty, is yet good at common law. Upon forfeiture, judgment may be entered for the debt and costs only." 9 Mass. 229.

In Virginia we find the same rule, as in 3 Call, 523, in which it was decided, "that, if a forthcoming bond is not good, as a statutory bond, it may be good as a bond at common law." This is a strong case.

And it appears also from the "dictum" of this court, in the suit upon the "collector's bond," 1 Ohio, 271, that this would have been sustained at common law.

From these cases we draw the inference that every bond given *voluntarily* is good and binding where there is no *statutory provision* against taking such a bond, or *prohibition* on the *principle* of the *common law* or of *good morals*.

We contend, therefore, that as the bond in question was given *voluntarily* by the defendants, it ought to *bind* them. That as the

Lytle v. Davies.

plaintiff was *compelled* (under our peculiar statute) to accept this bond, thus given by the defendants, the *act* **was complete* [284 and became *binding* on both, and that, as there is no statute or principle of the common law declaring such bonds void, there can be no reason why it should not be held valid at "*common law*."

By the Court:

Our statute provides, "that every person *imprisoned* for debt, either on mesne process, or in execution, shall be permitted and allowed the privilege of prison bounds." The bond, in the case before us, recites that Baymiller has been arrested, and is in custody of the sheriff. But does not state that he was imprisoned. An arrest, and being in the custody of the sheriff, precede imprisonment, and are distinct and different from it. The facts stated in the bond show that the case, in which the statute authorizes the bond to be taken, had not occurred. Baymiller was not imprisoned, but only arrested on mesne process. The sheriff, in that situation, could not legally discharge him, on taking a prison bounds bond. In doing so he permitted an escape.

The plaintiff's counsel have cited many cases, in which bonds of this description have been sustained, though not taken strictly according to the law. But so far as we have been enabled to examine them, these bonds were taken, when, upon the circumstances attending their execution, they were legally taken. The facts existed which authorized the officer to take the bond, and the exception was to the form of the bond itself. But the ground upon which we hold this bond defective is that the officer had no authority, upon an arrest only, to accept it, and discharge the body. By doing so he could not affect the plaintiff's rights, who might insist upon a recaption, or proceed against the sheriff for an escape. It was at his option to treat the bond as a nullity, but he could not by his assent give it validity.

The exception, that one bond is taken in three distinct suits, is also, in our opinion, a fatal one. The obligation is entire, and the whole penalty must remain, even if two of the suits were disposed of. It is in the nature of an appearance bail bond, and is, therefore, a part of the proceedings in the cause. For this reason it should be taken separately, so as to **be connected with* [285 the separate case to which it belongs, and separately proceeded upon, should it be forfeited. It would be vain and useless to at-

Lytle v. Davies.

tempt enumerating the many inconveniences which might arise from taking a joint bond, upon the execution of separate processes. The power to require such a bond might be used for very oppressive purposes. And where the statute does not authorize it, the court think they ought not to sustain it.

The plaintiff has cited two cases, in which a single bond was taken by the officer upon separate processes and held good. But we do not consider these cases analogous. In 8 Johns. 111, the exception was not taken by the counsel or noticed by the court. In stating the case, it is noticed that the bond was given upon three executions issued from a justice of the peace. We know not how far the law of New York might, in terms, warrant such a proceeding. As it formed no ground of exception, we should infer that it was conformable to statute, or to a settled practice. However, as the point was not made nor decided upon, we can not consider the case an authority.

The case from 2 Call, 290, was one where a forthcoming bond was taken, in two cases of suits against the securities of two separate sheriffs of the same county, under a special act of assembly directing the executions to be stayed, upon a forthcoming bond being given. The court, in their opinion, admit that it is not common to take a joint bond upon separate executions. They say the bond was so taken that neither party could be prejudiced. But they decide the cause upon the act of assembly, which they say "rather points to one bond only." We can not regard this case any more than the one from New York, as an authority to which our own opinions should be yielded. The unity and consistency of legal proceedings, and the safety and security of all the parties, require that a bail bond, or prison bounds bond, should be taken separately in each separate suit.

It is strongly urged by the plaintiff's counsel that if defective as a bond under the statute, this bond is good at common law, as a voluntary bond.

The numerous cases cited to sustain this position are all essentially different from the one before us. The sheriff *takes a bond from the prisoner conditioned that he will remain a true prisoner. This is in the nature of a contract. It relieves the sheriff from an incessant vigilance, and it secures to the prisoner the enjoyment of his own time, free from the superintendence of

Lytle v. Davies.

the officer. The contract is a beneficial one to both parties, and, if not prohibited by law, would be deemed valid.

In the case of a forthcoming bond, the sheriff having legally levied upon the defendant's property, restores it to him, upon taking a bond with security for its redelivery. If taken in a proper form, and returned with the execution, in Virginia, a very summary remedy is given on such a bond. But if not thus taken, it is still deemed a good bond, and may be sued upon as in the common case of a contract. And for this reason the contract was a valid one, made for a legitimate purpose, and operating beneficially for the obligor. There is no case where a bond is unauthorized by law, and where no advantage can result to any one, that a bond given under the belief that it is for a legal purpose, when it is not, is held valid.

If an officer, alleging he has process, when he has not, without making an arrest, take a bond for the prison bounds, where the obligor is actually the judgment debtor of the obligee, it would clearly be a voluntary bond, yet it would undoubtedly be inoperative, because it was taken without authority, and could, in no respect, benefit the obligor.

So, in this case, Baymiller not being in prison, the sheriff had no authority to take the bond. It was therefore voluntary. But it did not preclude the plaintiff from retaking the defendant had he chose to do so, or from proceeding against the sheriff as for an escape. Had the defendant been retaken, would the bond have been obligatory? If it would, he certainly received no advantage from it. If it would not, the reason must be that it was void from the first. There is nothing in it, by which its obligation can be made to depend upon the act of the plaintiff. In declaring this bond inoperative, we impugn none of the decisions adduced by the plaintiff in support of it; on the contrary, we conform to the principles upon which those decisions rest.

Judgment affirmed.

287] *LESSEE OF N. MASSIE'S HEIRS v. EDW. LONG AND OTHERS.

Execution issued after the death of defendant, upon judgment rendered in his lifetime, and levied upon lands of which he died seized, sale void.

Sale of lots for taxes void, where taxed as "part of a lot," "one acre of a lot." Description too vague and indefinite.

Tenants in common may make a joint demise.

Prochein amie can not make a demise to sustain an action of ejectment.

THIS was an action of ejectment, reserved for decision in Ross county.

The title of the lessors of the plaintiff was founded on a patent issued to them since the death of their father, as heirs at law, to take as tenants in common and not as joint tenants. This patent was given in evidence, and the possession of the defendants was admitted.

The defendants set up a title in themselves: First, under a sale upon execution; second, under a sale for taxes.

The sale upon execution was founded upon a judgment rendered against Nathaniel Massie, in his lifetime, upon which executions had been sued out, so that it had not become dormant. Nathaniel Massie died in 1813. On January 19, 1818, execution was sued out against Nathaniel Massie as against a person then in life, was levied upon the property in question, which was sold by the sheriff. The sale was regularly conducted and the deed duly made. The defendants are in possession under the purchaser.

The premises in dispute are part of out-lot No. 43, on the plat of the town of Chillicothe. The title set up under a sale for taxes rested upon the following facts: The corporation record showing the levy of the tax for the year 1816 was adduced in evidence; the appointment and qualification of the collector, the advertisement of the time of sale, the sale and deed to John Hillings, were all in evidence. The list or duplicate, in which the lots were set for or charged with the tax, was given in evidence. In one place upon this list a part of out-lot No. 43 was charged with a tax. In another place "one acre of out-lot No. 43" was charged with tax in the name of Edward Long, one of the defendants. Parol proof was offered that the "one acre" named on the list

Lessee of Massie's Heirs v. Long and others.

was on the north quarter, where Long lived, which is the lot in question. But the testimony was objected to and overruled.

Verdict for the plaintiff.

The defendants moved for a new trial upon four distinct grounds:

- *1. The title under the sheriff's deed was a valid one. [288]
2. The title under the marshal's sale for taxes was valid.
3. Tenants in common can not make a joint demise.
4. An infant can not make a lease by *prochein amis*.

DOUGLAS, in support of the motion:

Contended, upon the first point, that the judgment attached a lien upon the land, which the death of the defendant, Massie, did not affect; that suing out execution after the death of Massie, as if he were alive, was, at most, but an irregularity, which could not be taken advantage of to defeat the sale under the execution in an ejectment. He cited and relied upon *Jackson v. Delancy*, 13 Johns. 550; *Jackson v. Robins*, 16 Johns. 576; *Young v. Young*, 2 Bin. 227; *M'Crea v. Bartlett*, 8 Johns. 361; 3 Mass. 523; 4 Mass. 150, 512; 1 Dallas, 481; 1 Mass. 204; 10 Mass. 170.

On the second point he urged that the proof was complete as to the regularity of the sale. The description of the property taxed was sufficient, for it could be rendered certain by proof. "One acre" to Edward Long, who was then a resident upon it, distinguished it as his part. As such it was advertised and sold.

Third. Tenants in common can not make a joint demise. *Coke Lit.* 45, a note; 2 Wils. 232; *Run. Eject.* 222; 2 Bac. Ab. 423; 4 Bibb, 241, 568.

Fourth. A *prochein amis* is appointed only to take charge of a suit. He has nothing to do with the estate, and can not make a disposition of it for any purpose.

It makes no difference that the lease in ejectment is a mere fiction. That fiction must be founded upon what might be real, not what is impossible, and is always so treated.

BOND, for the plaintiff, argued:

That an execution sued against a dead man was void, and not merely irregular. That the cases cited by the defendants' counsel were none of them in point. That the dictum of Judge Kent, in *Jackson v. Delancy*, was not authority, and was not recognized

Lessee of Massie's Heirs v. Long and others.

as such by the Supreme Court of New York, in *Jackson v. Robins*, 289] 15 Johns. 169. *That the reiteration of the same opinion by Judge Kent, in the court of errors, 16 Johns. 572, was also but a dictum, and that none of the cases were decided upon that ground.

1. In the case from 2 Bin. 227, a *scire facias* had issued, but the service had been irregular, and such was the fact in the New York cases also. The case from 8 Johns. 361, was not that of a dead person, but an execution against a living person upon a dormant judgment.

2. As to the tax title, the evidence did not show any assessment of a tax, nor was the lot listed by a proper and sufficient description. A conveyance for "*part of out-lot No. 43*" would be void for uncertainty; a conveyance for "*one acre of out-lot No. 43*" would constitute the grantee a tenant in common, and could not entitle him to any particular part. The sale of a particular corner was a direct departure from the authority, which was to sell one acre, without any location. Parol evidence could not be received to explain or help these insufficiencies.

3. The better and modern doctrine is that tenants in common may make a joint demise. But in this case it has been decided that the lessors of the plaintiff took by descent; they are therefore parceners, and upon the old principle can make a joint demise.

4. The statute supplies an answer to the fourth point: "If an infant be entitled to any action, his guardian or next friend shall be admitted to prosecute for him." 22 Ohio L. 83.

An infant can make a lease, and it is not void, but voidable only. *Landlord and Tenant*, 79; *Bac. Ab., Leases*, B.

LEONARD also submitted an argument for the defendants. On the validity of the sheriff's sale, he insisted that the award of execution was a judicial act, upon which a writ of error would lie. He cited *Bac. Ab. (Error)*, 450, 452, 453, 484; *Hardin*, 151-153. If a judicial act, then it must be reversed direct on a writ of error, and can not be questioned collaterally.

290] *By the Court:

It is well settled that if the defendant die after execution is sued out and levied, that the execution proceeds as if the death had not taken place. The reason generally given for this is, that execu-

tion is an entire thing, and having once commenced, can not be stopped. But there is undoubtedly a much more satisfactory reason to warrant the proceeding, at least in the case of a levy upon chattels. By the levy the property of the defendant in the goods is divested, and the sheriff acquires a special property, which it is his duty to divest himself of according to the exigent of the writ. No rights are affected by this proceeding but those of the actual parties; no other interests are touched.

If the defendant die after execution sued out and before levy made, the execution can not proceed. And the reason is this: the sheriff is commanded to take the property of the defendant, but by his death this becomes impossible. His right of property terminated and other rights have commenced. Whether this right rests in the heir, administrator, executor, or devisee, it matters not. The right of property is changed, and with that change the authority of the sheriff, under the execution to take it, is gone. He might as well levy the property of an entire stranger.

This proposition is not affected by the fact that the property of a deceased person remains liable, in some shape, for the satisfaction of the judgments against him. The law has prescribed the mode of reaching it in the hands of those to whom it passes at the death; and that method must be pursued.

It may, for the sake of argument, be conceded that an execution issued upon a judgment, where the defendant is dead, is not void, but voidable only; its effect is not the less nugatory. There is nothing upon which it can operate. It commands that to be done which is impossible. If the officer seize chattels of which the defendant died possessed, they belong to the personal representative. If he levy on land, it is the property of the heir or devisee. The only true return he can make is that there is nothing upon which he can levy.

*We have carefully examined the cases cited by the defendant, in which it is said to be adjudged that a sale of lands, upon execution sued out and levied, after the death of the judgment debtor, is so far valid that it can not be questioned collaterally on the trial of an ejectment. The cases do not sustain this position. In the case of *Jackson v. Delancy*, a *scire facias* to revive the judgment was issued, served, and a judgment rendered upon it. It was alleged that the person to be affected was not a party, and that, as to her, the case stood as if no *scire facias* had issued. What weight

Lessee of Massie's Heirs v. Long and others.

this had in the decision we can not tell. Judge Kent, himself, placed the cause upon the ground, that the description of the lands, in the sheriff's deed, was too indefinite and vague to convey title.

The case of Jackson v. Robins is open to the same objection. There was a *scire facias*, and it was served upon the party claiming in that case, and judgment rendered on it. So that the point now before us was not decided, although discussed, and some remarks made upon it by Judge Kent.

We have every possible respect for the opinions of that distinguished jurist. But we can not adopt the arguments he has thrown out upon this subject. He says he "takes the law to be, that even the omission altogether of the *scire facias* will not, as of course, render void a sale under execution." He illustrates this position, by referring to cases where executions, sued on judgments, after a year and a day, were held not to be void, but a justification to the party who acted under them. He supposes that there is no difference between such cases, and one where the defendant was actually not in existence. And he cites the case from 2 Binney, as in point, to sustain his opinion. But we think the cases are materially and essentially different.

In the first case, there is no change of parties, nor of interests. The defendant on the judgment against whom execution issues, is a living party, competent to protect his own rights. It is upon his property that the execution is to be levied, and when so levied, the command of the writ is strictly complied with. No rights are interfered with but those of a party to the judgment. It has been 292] already shown, that in the case of the defendant's *death, the rights of property are changed, and other parties are interested. This single consideration destroys all analogy between the two cases.

By our laws, the personal goods of a decedent constitute the primary fund for the payment of debts. It is only when they are exhausted that land can be subjected in aid of them. If, upon execution against the deceased, a sale of land could be valid, the heir might be greatly prejudiced. The personal representative having the personal estate in his possession, the sheriff could not touch it, the land only could be levied on, and thus might be swept away, for the payment of debts, when in fact the personal estate is sufficient. The heir or devisee may thus be deprived of his estate without any opportunity to defend it. The concession, that such execution is irregular and may be set aside, at a proper time, does

Lessee of Massie's Heirs v. Long and others.

not remedy the mischief. The heir is no party, and is not bound to know, or take notice of the proceeding. On the contrary, the maxim of the law is, that he should have a day in court, not to be sought for by himself, but upon the call of the plaintiff. We think that there is a much stronger necessity, in this case, for a *scire facias* against the heir or devisee, than in the case of judgment, where the defendant is alive, but no execution has been sued within the time limited by law.

We do not consider the case from Binney as any more in point than those from New York. In that case, a *scire facias* was sued out, as in the New York cases, and there was a judgment upon it. The defect in the service was an irregularity, but the judgment upon it was not therefore void. The execution issued upon a judgment, against a living defendant, party to that judgment, not, as in this case, against a deceased defendant. In that case, the execution was levied upon the land of a living defendant; not, as in this, upon the lands of persons neither parties nor privies. It was clearly a case of irregularity, which amounted to error, but could not make the judgment a nullity.

The cases from Massachusetts are all judgments against executors or administrators; and in that state lands are assets, in their hands, so that the doctrine there can have no application here.

*It is therefore the opinion of the court that the sale by [293 the sheriff was inoperative, and did not divest the lessors of the plaintiffs of their title.

Upon the second point there can be no difficulty. The assessment of a tax upon a "part of a lot," or "one acre of a lot," without quantity or location, in the one case, or without location in the other, is too vague and indefinite to authorize a sale of any part or in any place.

By section 59 of the judicial act, it is provided that "in all actions of ejectment the plaintiff shall have the same benefit and advantage from a joint demise that he could from several demises." This embraces the case of tenants in common. We have so settled this term in the case of the Lessee of Wilkinson v. Fleming, from Butler county.

The objection that infants can not make a lease by *prochein amie* is fatal to the plaintiff's recovery for all that he claims upon the demises of the infants.

Although the demise is a mere fiction, it is treated for many

Gilmore v. Miami Exporting Co. and others.

purposes as a real transaction. If the lessor of the plaintiff die pending the suit it does not abate, because the nominal plaintiff survives. If, pending the suit, the lessor convey his interest in the land, the plaintiff may still recover. The lessor by transferring the fee can not destroy the term of the lessee, but must convey subject to it. The demise, for the purpose of justice, is thus considered a *real* transaction, and must therefore have the *appearance* of a *legal* one. A *prochein amie* has no power to lease the lands of his protegee. He is neither attorney nor guardian. His office is solely to prosecute the suit, and for this purpose it is not necessary he should execute the supposed lease. A person acting in the character of an infant's friend could not make a lease of lands that would bind the infant, or give the lessee a right of possession. Such a lease, though fictitious, yet being a necessary part of the plaintiff's right to recover, must be equally inoperative for that purpose. The verdict is incorrect, and must be set aside. Except for the undivided part of the lessor, who, being of age, joined the *prochein amie* in the demise.

Judgment accordingly.†

294] *JOHN AND G. R. GILMORE v. MIAMI EXPORTING COMPANY
AND OTHERS.

An execution upon the judgment at law, and a return that sufficient property could not be taken to satisfy the debt, is not indispensable to authorize a proceeding in chancery, under section 59 of the chancery law.

Sale of lots for taxes void, where taxed as "part of a lot," "one acre of a lot." Description too vague and indefinite.

Tenants in common may make a joint demise.

Prochein amie can not make a demise to sustain an action of ejectment.

THIS cause was adjourned from the Supreme Court of Hamilton county. It was a bill in chancery, under section 59 of the statute

†NOTE BY THE EDITOR.—That tenants in common may make joint demise, see also ii. 301; vii. part 2, 136; viii. 180; vi. 391. As to levy of execution after defendant's death, see also i. 458; v. 221. Revival by *scire facias* on death of defendant, see Swan's Stat. 669, secs. 86, 87; also, xiv. Ohio L. 25. For the cases when descriptions in tax sales have been held defective, iii. 569; v. 458; x. 152; vi. 161; xi. 316; xvi. 24.

Gilmore v. Miami Exporting Co. and others.

regulating proceedings in chancery, to charge debts due from the other defendants to the Miami Exporting Company, with the payment of a judgment obtained by the complainants against the company. Upon one judgment no execution had been sued out; upon the other, execution had issued, was returned *nulla bona*, and levied upon real estate, which, upon a *vendi*. had been sold for a very small sum. No new *fi. fa.* had been taken. The bill did not charge that execution had been sued and returned, nothing to be found, and for this cause the respondents demurred.

N. WRIGHT, in support of the demurrer, contended:

That the common doctrine in equity is, that the complainant must show in his bill that execution had issued and been returned, no property, before an application could be made in equity to aid an execution or obtain satisfaction of a judgment. He cited Coop. Eq. 149; 1 P. Wms. 445; Mit. Pl. 115; 1 Ver. 399; 2 Atk. 477; 3 Atk. 200; 1 Eq. Cas. 77; 4 Johns. Ch. 671; Id. 691; 20 Johns. 565.

He further contended that the rule previously established was not changed by our statute. A rule settled is not changed by a change of phraseology in a subsequent statute. 2 Caine's Cas. in Error, 150; 4 Johns. 359.

The different statutes authorizing proceedings against banks, all concur in requiring that an execution shall issue and be returned, no property found, before chancery proceedings or attachment shall go against the credits of the bank.

Section 59 should be construed in connection with the three preceding sections. They make provision for reaching, in equity, different species of property in aid of executions at law; and they require an execution to issue and be returned, as the foundation upon which to commence *proceedings in equity. Section [295] 59 merely extends the same remedy to creditors generally; and, although it does not in terms require that an execution should issue and be returned, that omission indicates no intention to introduce a new mode of proceeding.

A process of this character is entitled to no favor or liberal construction; it is a high-handed interference between debtor and creditor, and opens the door for great abuses. 4 Mass. 121; 3 Id. 91.

STORER, CASWELL, and HAMMOND, for complainants, argued:

That the rule in England and New York had no application in this state. That the cases cited were cases in which a court of

Gilmore v. Miami Exporting Co. and others. .

equity upon general principles, and upon rules prescribed by themselves, interfered to aid an execution at law. The doctrine maintained in the cases from P. Williams, Atkyn, Vernon, and Equity Cases, had been abandoned in England. 1 Anst. 381; 1 Ves. Jr. 196; 9 Ves. 189; 10 Ves. 366; 1 Hopk. Ch. 89. In *Hadder v. Spade*, 20 Johns. 575, Judge Platt admits that there is contrariety of decisions and dictas in the English court, and declares his unwillingness to go farther, as a chancellor, than to aid in reaching goods liable, in themselves, to the execution. He expressly disclaims a power to reach choses in action, because he had not been conferred upon courts of equity.

The statute of Ohio gives a new remedy, and it presents the terms upon which it is given. It does not require that an execution should issue. But authorizes this bill in all cases where there is a judgment, and the defendant has not *sufficient* personal or real property which can be taken in execution to satisfy the same. He specifies the allegations to be made in the bill, and they are: that there is a judgment which the debtor has not sufficient real or personal property that can be taken in execution to satisfy. It is not a bill in aid of an execution at law, to subject to execution property liable to be taken and sold. On the contrary, it proceeds independent of an execution to subject debts and credits which could not be taken in execution. By the statute itself execution may be taken out pending the bill, if anything can be found [296] to be taken upon it. The allegation *required is not that there is *no property*, but that there is *not sufficient*. It is, therefore, in its character totally different from the cases cited for the demurrants.

The law gives a new remedy entirely, and prescribes the prerequisites. The Ohio statute is not additional legislation extending an existing provision. It is new altogether. No established rule existed in respect to it.

If, by the phraseology of the preceding sections, an execution is required, the omission to require it in this is to be taken as a deliberate act, placing this subject upon distinct ground.

The fact that the defendant in the judgment at law has not sufficient real or personal property upon which execution can be levied to pay the debt is one which may be controverted. The plaintiff files his bill at his peril. If, without a proper cause, he binds up his debtor's credits by a bill of this nature, not only must

Wright v. Lepper and Ledley.

his bill be dismissed, but he may be otherwise answerable. On the other hand, if the judgment creditor must wait until an execution is sued out and returned, the debtor may collect his debts, or place them beyond the reach of even this description of bill. To be effectual, the remedy should be free from the clog of a previous execution.

ESTES, in reply, urged, that admitting this was a new proceeding, given by statute, and that without it chancery could only aid in execution at law, in cases of fraud or trust, still chancery ought not to interfere without an execution had been issued, and returned that there was not property liable to be taken on execution to satisfy the debt. The law imposed two indispensable conditions: a judgment, and insufficiency of property. The court should receive no evidence of the latter but a return upon an execution. A more rigorous execution ought not to be adopted where there was no imputation of dishonesty than in case of fraud. This kind of bill locks up all the debtor's means. Its effect may be to prevent a disposition of property, or a collection of funds to pay the debt. The party resorting to it should be held to the strictest compliance with the statute.

*The COURT overruled the demurrer. Judge BURNET being [297] a stockholder in the Miami Bank did not sit in the cause. Judge SHERMAN dissented. A majority of the judges not uniting in the opinion, no reasons were given.†

WRIGHT v. LEPPER AND LEDLEY.

Bond for the redelivery of property taken in execution, and not sold for half the appraisement, under the act of 1820, and not redelivered or tendered to the officer who made the levy, or his representatives, within six months, is forfeited, though no new execution sued out.

THIS case was adjourned from the Supreme Court of Columbiana county. It was an action of debt upon a bond given under section

†NOTE BY THE EDITOR.—That execution need not issue before creditor's bill will be entertained, see also vi. 227.

Wright v. Lepper and Ledley.

12 of the act of February 24, 1820, for the redelivery of property taken in execution, and not sold for one-half of its appraised value.

The condition of the bond, after reciting the previous facts of execution, levy, and redelivery, is in these words, "If the said James Orr doth well and truly, and without fail, deliver unto the officer having an execution on the above judgment, the above-mentioned goods and chattels, within six months from this date, then this obligation to be void."

There were several pleas and notices, but the facts in the cause intended to be presented, and upon which the cause was decided, were, that the plaintiff did not sue out any execution upon his judgment within six months from the date of the bond, and no delivery was made of the goods to the officer, or plaintiff, nor any offer made to deliver them.

J. C. WRIGHT, for plaintiff, contended:

That upon giving the bond, the defendant was entitled to a stay of the execution and possession of the goods, until the expiration of six months. When that period elapsed, it was the business of the securities in the bond, if they wished to save the condition, to deliver the property to the officer who had the execution and took the bond, or to 298] his representatives or successor. That the plaintiff was *not bound to sue out a new execution, and under the law could not sue, until the six months expired. That the ambiguity in the law must be so interpreted as to give effect to its obvious intention, and not to defeat that intention. If it were in the plaintiff's power to sue out a new execution immediately upon the return of the first, and thus compel a redelivery of the property, or a forfeiture of the bond, the object of giving the bond, and the intention of the legislature to relieve the debtor by giving him time, would be entirely defeated.

LOOMIS and METCALF, for the defendants, maintained:

That the bond could not be forfeited unless the plaintiff sued out a new execution within six months, and put it into the hands of an officer, to whom the condition of the bond could be performed. That unless this was done, it was impossible for the defendants to discharge the obligation, and that impossibility being produced by the neglect of the plaintiff, the condition of the bond was saved.

Wright v. Lepper and Ledley.

They protested against the interpretation that the goods were to be redelivered to the officer who made the levy, as being one directly repugnant to the terms of the statute, which were that the delivery should be made "to the officer, having in his hands the execution upon the same judgment, within six months thereafter." The words employed contemplate a second execution, else why use the words "*upon the same judgment.*"

They urged that the officer who *had* the execution might be no longer an officer; that he might not be in existence; that the power over the subject might be transferred to an officer unknown to the defendants; and insisted that the defendants could only be subjected by a call for the redelivery of the goods, by some person duly authorized to receive and dispose of them.

By the COURT:

The defendants in this case are securities in a bond for the redelivery of property seized in execution, at the suit of the plaintiff against James Orr. After the execution of the bond no second execution was sued out within six months, and no tender [299] was made by the defendants, or by Orr, to perform the condition of the bond. The question to be decided, is whether the condition of the bond is forfeited under these circumstances.

By section 12 of the act of February 24, 1820, it is provided, *inter alia*, "that it shall be lawful for such officer to deliver such article or articles to the judgment debtor, upon his giving bond, with two securities, to the satisfaction of the officer, that he will deliver said article or articles to the officer *having in his hands* the execution upon the same judgment, within six months thereafter, which bond shall be made payable to the other party to the execution, and shall be returned with the execution to the court or justice of the peace from which the same issued."

The case turns upon the construction to be given to this provision. It is contended for the defendant, that the words "*to the officer having in his hands the execution,*" must refer to the time when the obligor is to redeliver the property, and that, therefore, the execution creditor, if he mean to resort to the bond, must sue out and place in the hands of an officer, a second execution, before the expiration of the six months. If he omit this, he prevents the performance of the condition by his own act, and the bond is discharged.

Wright v. Lepper and Ledley.

We do not think that the law can correctly receive this interpretation. It was undoubtedly the intention of the legislature to give the debtor a stay of execution for six months, if his property would not sell for one-half its appraised value, and it is our duty, if possible, to give the law such construction as it shall give effect to this intention.

The phraseology of the act is very loose and indefinite; "*within six months*" are terms of uncommonly general import. But there can be no question that he, who is bound by a condition to do an act *within six months*, has the whole period of six months to perform it in, and can not be called upon, by the other party, to perform it before the last day. It would be a violation of just principles to read the provision so as to connect the words, "*within six months*," with the fact of the officer having in his hands an execution, and thus enable the plaintiff, by suing out a new execution, to enforce a performance of the condition within six days instead of six months.

300] *The principal difficulty is to determine the true meaning of the words "*the officer having in his hands the execution upon the same judgment.*" The present participle "*having*," may refer to the period of time when the bond was taken; it may also refer to the period when the bond is to be performed. The first is its most natural interpretation. The officer *now having* the execution upon the judgment is the plainest reading. If it referred to the future, its proper reading would be the officer who shall have an execution. The most obvious sense of the language of the act is in accordance with its intention.

When the officer *having* the execution made the levy, he acquired a special property in the chattels levied upon; he became entitled to the possession, and could sell them without an execution, if they were not sold in the first instance for want of bidders. The special property of the officer excluded all other claims upon the property of subsequent date.

Was his special property divested by the redelivery of the goods to the plaintiffs and receiving a bond? We are of opinion that it was not. The bond was in the nature of a security, that the property should be safely kept, and returned to the officer when the time of keeping it expired. But the special property of the officer remained, until the condition of the bond was broken. Up to that period the possession of the judgment debtor was the

Doe v. Fleming.

possession of the officer. Before the forfeiture of the condition, no other execution could be levied upon the property. This construction is consistent with principle, and for the security and ease of the debtor. It enabled him to obtain security, because the redelivery of the property to him did not expose it to the grasp of another creditor.

The forthcoming bond, in Virginia, is of the same character with the bond to redeliver in this case. And it has been settled in that state, after great consideration, by two judges to one, that the redelivery of property taken in execution, to the defendant, upon giving a forthcoming bond, does not divest the right of property from the sheriff, and that the security has a right to deliver the identical property, to save the condition of his bond. *Lusk v. Ramsay*, 3 Mun. 417.

*If, then, the special property in the goods, in this case, [301 vested in the sheriff, upon the levy, and remained in him while the condition of the bond was unbroken, it is a necessary consequence, that the condition only could be saved by a redelivery, or an offer to redeliver to him or his legal representatives, at the time stipulated in the bond, which, at the option of the defendants, might be the last day of the six months. The plaintiff could not sue out a new execution, for the levy was *quo ad* a satisfaction. This interpretation, a majority of the court are of opinion, gives force and effect to the intention of the legislature; is consistent with the literal meaning of the language employed, and harmonizes with established principles. Judgment for the plaintiff.

Judge BURNET dissented.

DOE, ON THE DEMISE OF WILKINSONS, v. THOMAS FLEMING.

Tenants in common may make a joint demise in ejectment.

THIS cause was reserved in Butler county. It was an action of ejectment, in which the declaration contained a single demise. The lessors of the plaintiff were six in number. They deduced title under the will of John Wilkinson, their father, who devised his lands to his seven children, as joint devisees. One of the dev-

Doe v. Fleming.

iscees had conveyed his share to a co-devisee, one of the lessors of the plaintiff.

The plaintiff having exhibited his title, as above stated, the defendant's counsel moved for a nonsuit, upon the ground that the title exhibited, showed that the lessors of the plaintiff were tenants in common, who could not make a joint demise. This motion was sustained by the court, and the plaintiff became nonsuit. The question, whether the nonsuit was correctly ordered, was, by agreement, reserved for decision at Columbus. If the decision was correct, judgment of nonsuit to be set aside, and a new trial awarded.

302] *HIGGINS, for the plaintiff, cited *Jackson v. Bradt*, 2 Caine, 169, where the courts of New York overruled the English decisions, and settled that tenants in common could join in a joint demise. He argued that the reasons alleged in New York were equally operative in Ohio. The doctrine originated in a technicality, which there was no propriety in adhering to. He also contended that the statute of Ohio had authorized tenants in common to make a joint demise. 22 Ohio Laws, 62, sec. 29.

WOODS, for the defendant, examined the decision in the case of *Jackson v. Bradt*, relied upon by the plaintiff, contested its correctness, and disputed its authority. He argued, also, that the statute did not authorize a recovery upon a joint demise, by tenants in common. Its intention was merely to declare what the law was, not to introduce a new rule. The provision that "separate demises should only be laid in the names of tenants in common," is inconsistent, upon any other construction, with other provisions.

By the COURT:

In the case of *the Lessee of Massie's Heirs v. Long* and others, decided at this term, the court have settled that, under our statute, tenants in common may make a joint demise. That decision is decisive of this case.

The nonsuit must be set aside, and a new trial directed.†

†NOTE BY THE EDITOR.—See note to *Lessee of Massie's Heirs v. Long et al.*, ii. 287, and that case.

***L. STARLING, EXECUTOR OF J. A. McDOWELL, v. JOEL [303
BUTTLES.**

Where surety gives notice to the creditor to sue, it is not a compliance with the statute to sue the surety alone.

THIS was an action upon a promissory note, and was adjourned from Franklin county.

The declaration was upon a promissory note, executed by Eli Adams, J. B. Gardiner, and Joel Buttles; and it appeared on the face of the note that Adams and Gardiner were principals, and Buttles a security.

The defendant pleaded that he was a security only, and the other two parties principals; that before the commencement of the suit against himself, he gave notice, in writing, to the payee of the note, and requested him to commence suit against the principals, agreeably to the provisions of the act for the relief of sureties and bail in certain cases, but that the payee wholly neglected to commence such suit.

To this plea the plaintiff replied, that within a reasonable time after receiving such written notice, the plaintiff commenced the present suit against the defendant, and has proceeded with due diligence. To this replication the defendant demurred.

WILCOX, for the defendant, and in support of the demurrer:

Insisted that the replication was bad. The statute provides that if, after the note becomes due, the principal shall be in failing circumstances, the surety may give the holder notice to sue the principal. That notice the holder disregards at his peril. It is no relief to the surety to be sued himself, and the commencement of such a suit can not be a compliance with the law. He cited, as in point, 13 Johns. 174; 15 Johns. 433.

ur

There was no argument on the other side.

By the COURT:

The act for the relief of sureties and bail, in certain cases, provides that in cases where the principal debtor is likely to become insolvent, or remove from the county or state, without discharging

Lessee of Dawson v. Porter.

304] the debt, the security may give the *holder of the obligation notice, in writing, forthwith to put the obligation in suit. And if the holder do not, in a reasonable time after such notice, commence a suit and proceed diligently to judgment and execution, he shall forfeit his right to demand the money of the surety.

The object of this act is plainly to enable sureties to compel a creditor, where his debt is due, to pursue the principal debtor by a suit, or exonerate the surety. It was intended to relieve sureties where the creditor felt safe in the responsibility of the surety, and took no steps to collect his debt, and it contemplates extending this relief, in a different form from that of compelling the surety to pay the debt himself, and thus become the creditor, and bring suit. If, upon receiving the notice, it would be sufficient to sue the surety alone, the object of the law would be evaded; indeed, its provisions would be converted into insulting mockery. Upon receiving the notice, the creditor is bound to bring suit against all the parties, and pursue them all to judgment. He need not sue the principal separately. But a separate suit against the surety, without any suit against the principal, is not a compliance with either the letter or spirit of the law.

The demurrer is well taken, and must be sustained.†

LESSEE OF DAWSON v. JOSHUA PORTER.

In ejectment, deed from the lessor of the plaintiff, made after suit brought, is inadmissible evidence to defeat plaintiff's recovery.

THIS case came before the court, upon a motion for a new trial, adjourned from the Supreme Court of Clermont county. The case was this: In an action of ejectment, the plaintiff gave in

†NOTE BY EDITOR.—Notice to sue must be in writing, vii., part 1, 72. In plea by surety, that the principal extended time, he must aver that he did not assent thereto, v. 207. Defense that time was given available at law, ib.; vi. 18; xi. 299. But not when suit is against principal and surety, x. 543; xi. 299. What acts of principal will discharge security, see v. 273; xiii. 84; xiv. 248; xviii. 6; and xviii. 54, where it is decided that bills of exchange are included in the meaning of the "act for the relief of sureties and bail."

Sergeant v. Steinberger and others.

evidence, a patent for the land in dispute, to his lessor. The defendant then gave in evidence, a deed for the same premises, from plaintiff's lessor to James Robb and others, dated after the commencement of this suit, and after the consent rule had been made, and the issue joined.

The plaintiff objected to the admission of this deed; but the court overruled his objection, and a verdict was given *for [305 the defendant. The plaintiff moved for a new trial, on the ground of mistake in the law, in admitting the deed offered by the defendant.

T. MORRIS, in support of the motion, cited 2 Wheat. 223; Adams on Eject. 31; 1 Marsh. 166.

By the COURT:

The authorities cited are conclusive that the court erred in receiving the deed offered by the defendant. There must be a new trial.

JAMES SERGEANT AND WIFE v. PETER H. STEINBERGER AND OTHERS.

No joint tenancy in Ohio.

Devise to husband and wife, and their heirs, devisees take as tenants in common.

THIS was a writ of error, brought to reverse a decree in chancery, dismissing the complainants' bill, and was adjourned for decision from Pike county.

The bill was filed to obtain partition of certain lands, one-fifth of which the complainants claimed in right of Mrs. Sergeant as heir at law to her mother.

The bill charged that D. M'Neil by his last will and testament, dated June 17, 1806, made the following devise: "I give and bequeath unto my daughter, Sarah, and unto her husband, Charles Steinberger, and their heirs and assigns forever, three hundred acres of land," etc. That Steinberger and wife took possession of the land. That Mrs. Steinberger died before her husband, leaving five children, of whom the complainant, Mrs. Sergeant, was one.

Sergeant v. Steinberger and others.

That Charles Steinberger, after the death of his wife, made his will, and devised the lands in question to the defendants, his three sons. The defendants demurred. The court of common pleas sustained the demurrer, and dismissed the bill.

306] *KING, for the defendants, insisted :

That the devise to Mrs. and Mr. Steinberger, vested each with an entirety of the interest, so that neither could separate it without the consent of the other, and consequently, by the death of the wife, the whole survived in the husband—that, therefore, the complainants showed no title. He cited 1 Co. Lit. 187, B; 2 Ver. 120; 2 Black. 1211; 6 Term, 652; 1 Ver. 233.

BOND, for the complainants, maintained :

That, admitting the estate to be of the character alleged by the defendants, yet the right of survivorship was claimed upon the principle of a joint tenancy, which was contrary to the genius of our institutions, and was, in effect, abrogated by the course of descents prescribed in the ordinance, by our subsequent laws, regulating descents, and by the law providing for the partition of real estates, which, in certain cases, authorized the executor or administrator of a deceased joint tenant to compel partition.

By the COURT :

It has more than once been decided, by the Supreme Court, on the circuit, that estates in joint tenancy do not exist under the laws of Ohio. The reasons which gave rise to this description of estate in England, never existed with us. The *jus accrescendi* is not founded in principles of natural justice, nor in any reasons of policy applicable to our society or institutions. But, on the contrary, it is adverse to the understandings, habits, and feelings of the people.

We have no statute recognizing the existence of any such principle as the right of survivorship. But we have various statutory provisions inconsistent with it. The laws passed, both during the territorial government and since, authorize joint tenants, tenants in common, and coparceners, and, in some cases, the executors, administrators, or guardians of such persons, to demand and have partition. It is from this evident that the legislature have treated a joint tenancy as a tenancy in common.

Lessee of McCulloch v. Aten.

*It is well settled that the joint tenancy of husband and wife varies in many principles from other joint tenancies. The estate could not be severed, which resulted, most probably, from the fact that the wife could do no act separate from her husband. The conviction of one of the parties of treason did not work a forfeiture of the other's right. And this was, we may fairly infer, a principle introduced to lessen the number of forfeitures, which were always odious. But the right of survivorship was the same as in other cases of joint tenancy, and in the case of husband and wife, is as much at variance with our laws and usages, as in the common case. Upon the death of Mrs. Steinberger, her undivided half of the land devised, descended to her children, who became tenants in common with their father. The complainants show a good title to one-fifth of their mother's part, constituting one-tenth of the whole tract, and appear to be entitled to have that tenth set off to them.

The decree of the court of common pleas is reversed, and the cause sent back to be further proceeded in.†

LESSEE OF McCULLOCK v. ATEN.

When a deed calls for a corner standing on the bank of a creek, "thence down said creek, with the several meanders thereof," the boundary is the water edge at low-water mark.

THIS case came before the court upon a motion for a new trial, and was reserved by the Supreme Court of Jefferson county.

Upon the trial, deeds were given in evidence from Emons the patentee to Smalley, from Smalley to Burson, and from Burson to McCulloch. Each of these deeds contained the following description of the boundary which was in dispute, "*beginning at a white oak, on the southeast bank of Yellow creek, thence down said creek, with the several meanders thereof, two hundred and seven perches to a post on the point, at the mouth of Hollow Rock, upper side.*"

The defendant gave in evidence a deed from Emons to Nessly, for a part of the same section of land, of prior date to that of Smalley.

† NOTE BY THE EDITOR.—No joint tenancy in Ohio, x. 1.

Lessee of McCulloch v. Aten.

308] This deed conveyed to Nessly, *land "to the north bank of Big Yellow creek, thence up said creek," etc., contained a covenant to allow Nessly to raise a dam on said creek ten feet high, for water-works, acknowledging satisfaction for all damages done to the residue of the section.

Also, a deed from Emons to Aten subsequent to that of Smalley, under which the lessor of the plaintiff claimed, in which the line in controversy was thus described: "*to land, the property of Burson, thence up Yellow creek, the several courses and distances thereof, to a marked white oak, corner of said Burson's land, thence across Yellow creek.*" Excepting to Nessly the right to back water, etc.

The white oak called for by both deeds was found on the ground about four rods from the channel of the creek, and about one rod from the top of the bank.

There was a salt well on the beach, below the break of the bank, but not within the water channel, and this was the matter in dispute. The defendant Aten was in possession of the well.

The defendant offered evidence to prove that at the time of the sale from Emons to Smalley, it was understood that the line was to run at the top of the bank, or along the beach and slope of the bank. But the court rejected the evidence and instructed the jury that according to the calls of the deed, the plaintiff had a right to recover to low-water mark on the creek as a common boundary. Verdict for the plaintiff and a motion for a new trial.

J. C. WRIGHT, in support of the motion, argued:

That ascertained boundaries, whether natural or artificial, controlled both course and distance. That from boundaries ascertained, lines were to be extended so as to connect them, and that if this can not be effected by straight lines, it is to be done by lines as near straight as may be. 1 Hen. & Mun. 131; 1 Bibb, 54, 123; 6 Wheat. 580; 7 Wheat. 7.

The white-oak corner and the stake were both found, and both stood on the bank above the beach or commencement. A line commencing at one of these corners can not touch the beach unless it
309] départ from the calls of the deed, *and proceed first to the beach. If the calls be clear of ambiguity, it must be because they proceed direct from the boundary ascertained on the course specified. If the position on the corners or boundaries on the ground, when

compared with the deed create ambiguity, that ambiguity may be explained by parol proof. And such was the state of the present case.

The case of *Denn v. Wright and Hill*, 1 Peters. 65, was relied on as full in point for the defendant.

The different grants from Emons, the source of all the titles, show what was his intention and how he understood the matter. He did not convey the creek to Nessly, but covenanted with him to permit the use of it for a dam. He did not convey any interest in the water to Smalley, under whom the plaintiff claims, for he commenced and continued the grant to him on the southeast bank of Yellow creek. To the defendant he conveyed the creek itself. His grant is bounded by the grant to Smalley, up the creek to the white oak, thence across the creek, and it contains a reservation of the use previously granted to Nessly. The grants should take effect according to the intention of the parties, when the terms used fairly admit of a construction consistent with that intention, as is the case here.

DODDRIDGE, for the plaintiff, maintained that when a proprietor of lands divided by a stream not navigable, conveyed upon one side to one party, bounded by the stream, and to another party on the other side, bounded by the stream, each grantee is entitled to a moiety of the bed of the stream. He cited *Hays and others v. Bowman*, 1 Rand. 420.

By the Court:

The single question to be decided in this case is, what boundary is described by the terms, "*down the creek with the several meanders thereof?*" And we think it perfectly clear that these terms describe the water in the bed of the creek, and not the top of the bank. This we understand to be a settled rule, wherever the stream is made the boundary. It is the water, and not the bank of its channel that is referred to. The state is bounded by the Ohio [310 river; but it can scarcely be supposed that the beach, below the break of the bank, is not within her jurisdiction. In the case of *Handly's Lessee v. Anthony*, 5 Wheat. 374, this doctrine is distinctly recognized by the Supreme Court of the United States as being a rule of boundary. And it is one to which this court have always adhered.

An attempt is made to distinguish this case from the general ap-

Lessee of McCulloch v. Aten.

plication of the rule, upon its particular circumstances. The boundaries described as corners are found on the bank, at a considerable distance from the water's edge. And it is maintained that by these corners, the grantee must be concluded. This position involves the consequence that corner trees always stand in the mathematical line, which technically is the boundary.

But this is not the fact, either with respect to corner or line trees. It is not unfrequent that both stand a greater or less distance from the actual line. The nearest and most permanent trees are usually marked. A tree marked as a corner, upon the bank of a stream, never can stand upon the water line at low-water mark. And where the call is for the meanders of the stream, the corner is not supposed to be exactly in the line.

The fact that the marked corner called for stands four rods from the water, does not create any ambiguity in the terms, "*down the creek, with the several meanders thereof.*" They import the water edge, at low water, which is a decided natural boundary, and must control a call for corner trees, or stakes upon the bank.

There is nothing in the various deeds inconsistent with this interpretation. Emons did not grant the creek to Smalley, but the land southeast of it. He did grant it to Aten, and made Smalley's line the boundary of the grant to Aten, and his repetition of the calls in Smalley's deed can not change their legal import. Nor does such repetition evidence any intention to do so, or to confine Smalley's grant to the top of the bank. When we decide that the plaintiff's boundary is the water, and not the bank, we impugn none of the principles laid down by Judge Washington 311] in the case of Wright and Hill, so strongly relied upon by *the plaintiff. New trial refused, and judgment for plaintiff on the verdict.†

†NOTE BY THE EDITOR.—The law of this case is reaffirmed in a number of cases in Ohio, for which see xi. 311, where, in the opinion of the court, the leading cases prior to the date of that decision are cited.

D. DORFLINGER v. GEORGE COIL.

Equity can not grant a new trial where party seeking it has been guilty of neglect.

THIS cause was adjourned from the Supreme Court of Ross county. It was a bill in chancery, praying that a new trial might be granted at law.

The bill charged that the respondent brought an action of covenant against complainant, in the court of common pleas of Ross county. That after the service of the process, he was informed by the clerk of the court that no security for costs was given, and that there could be no trial upon that account. In consequence of which information, he did not attend to make defense. That judgment passed against him in the court of common pleas by default, of which he obtained information, and took and perfected an appeal to the Supreme Court. That he employed Judge Thompson to defend it, who advised him there could be no trial at the first term of the Supreme Court. Reposing upon this advice, he did not attend the court; and Judge Thompson, his counsel, was absent at the sitting of the Supreme Court, in his place as a member of Congress, at Washington. That judgment, by default, was rendered against him in the Supreme Court, of which he knew nothing until served with an execution. He also charges a full and complete performance of the contract upon which the suit is brought, which he could establish by proof, if a new trial were granted. He prays a new trial. The respondent demurred, and the cause was heard upon the bill and demurrer.

SILL and LEONARD, for defendant, cited 1 Johns. Ch. 320, 465, 466; 2 Hen. & Mun. 139; 4 Hen. & Mun. 369.

*BOND, for complainant, cited 2 Tidd's Prac. 816; Bul. N. [312 P. 327; 2 Caine, 181; 2 Marsh. 153; 2 Salk. 645; 4 Mun. 68.

By the COURT:

The bill makes no case of either surprise or mistake, but only a case of negligence. Had the defendant attended the sitting of

Smith's Adm'rs v. Com'rs of Licking Co.

the court, and paid proper attention to his business, a judgment by default could not have passed against him. It is no sufficient apology for abandoning all attention to a suit in court, that counsel informed the party it could not be tried at the first term. However great the hardship, a court of equity never relieves in a case of this character.

The demurrer must be sustained, and the bill dismissed.†

SMITH'S ADMINISTRATORS v. COMMISSIONERS OF LICKING COUNTY.

In an action on a sheriff's bond, judgment must be for the debt, with leave to take execution for the damages. Judgment for damages only is erroneous.

THIS was a writ of error to the judgment of the court of common pleas, in Licking county, adjourned here, for decision by the Supreme Court, sitting in that county.

This suit was brought by the commissioners against the administrators of Smith, who was security upon a sheriff's official bond. The defendant pleaded *non est factum*, upon which issue was joined, and also a special plea, to which there was a demurrer. The common pleas sustained the demurrer. And upon the plea of *non est factum*, the jury found a verdict for the plaintiff, and assessed the damages sustained by the person for whose use the suit was brought. Judgment was entered for these damages only, and not for the debt, to have execution for the damages.

The case was argued at large, upon the question presented by the plea and demurrer, as well as upon the form of entering the judgment.

313] *IRWIN, for plaintiff in error.

EWING, for defendants in error.

By the COURT:

There is a difference of opinion among the judges as to the validity of the plea. But as they are unanimous in the opinion

†NOTE BY THE EDITOR.—See note to case of Steel et al. v. Worthington, ii. 182.

Loines v. Philips.

that the judgment was erroneously entered, they do not decide upon the other matters. The statutory provision, in cases like this, is express, that the plaintiff shall "recover judgment for the amount of the bond, on which judgment an execution may issue for such sum as it may be ascertained will be sufficient to indemnify the person so suing." The judgment in the case before us does not conform with this provision. It is, therefore, erroneous, and must be reversed. The court award a *venire de novo*, and remand the cause to the court of common pleas of Licking county, with leave to the parties to amend their pleadings.

JAMES AND RICHARD LOINES v. JAMES PHILIPS.

Original application of insolvent debtor is *ex parte*.

When application of an insolvent debtor is dismissed upon hearing, on the ground that he was not two years a resident, security is liable.

THIS was an action of debt, upon a bond executed by the defendant, as security for Stephen Loines, upon his application for the benefit of the act for the relief of insolvent debtors.

The declaration set out the bond, the condition of which was, that the applicant, Stephen Loines, "should faithfully assign all his property, for the benefit of his creditors, to such trustee as the court may appoint. The defendant pleaded seven pleas, some of which were demurred to, and to others there were replications and rejoinders, and demurrers again, presenting all the complexity and nicety of special pleading. The state of facts upon which the judgment of the court was required, is as follows: Stephen Loines, being arrested upon mesne process, in October, 1822, applied to the court of common pleas of Ross county, then in session, for the *benefit of the act for the relief of insolvent [314] debtors. The usual order was made, that it appearing to the court that the applicant had been two years a resident of the state, he should be discharged out of custody upon giving a bond, with security, to assign his property to such trustee as the court might appoint upon the final hearing. The defendant, with the applicant,

Loines v. Philips.

executed the bond in question, and the applicant was discharged out of custody.

The regular notice was given, and at the next term the applicant appeared in court, and applied to have a trustee appointed, that he might make the assignment of his property, in compliance with the condition of his bond. The plaintiffs in the action also appeared, and objected to the appointment of the trustee, upon the ground that the applicant had not, in fact, been two years in the state, and, therefore, was not entitled to the benefit of the act for the relief of insolvent debtors. This fact being made out to the satisfaction of the court, they refused to appoint the trustee, and made an order dismissing the petition. The question was, whether, upon this state of facts, the plaintiffs were entitled to recover?

DOUGLAS, for the defendant, contended:

That the defendant, a mere surety, was not liable upon this bond, because the performance of the condition was prevented and rendered impossible, by the interference of the plaintiffs, and by the act of the court.

Conditions annexed to personal contracts are to be interpreted according to the real intention of the parties. Sir T. Raym. 464.

If a party undertake that a stranger shall do this or that, and the stranger refuses, the obligation is broken, unless the refusal be procured by the other party. But if the obligation be, that the obligor will do an act *upon* the performance of another act by a stranger, the obligation is saved, if the first act be not performed. 1 Saund. 216; 1 Term, 642; 6 Term, 200.

Had the defendant undertaken that the court should appoint a trustee, then the obligation would be broken, if such trustee were 315] not appointed. Even then the interference *of the plaintiff, to prevent the appointment, would have saved the obligation; but here is no such undertaking.

The court refused to appoint a trustee, thus rendering it impossible that the condition to assign should be performed. The undertaking of the security was only that the applicant should do what the law required him. If the law did not require him to assign, but rendered it impossible for him to do so, the security ought not to be subjected. A security can not be charged unless brought within the strict letter of his undertaking. 9 Wheat. 680;

Loines v. Phillips.

LEONARD, for plaintiff:

The defendant has not performed the condition, and must, therefore, be liable, unless he is legally excused. He would be excused, if the condition was manifestly impossible at the time the obligation was made. But this is not the case.

So he would be excused had the performance become impossible by the act of God, as by the death of the petitioner; or if rendered impossible by the act of the obligee, or by some subsequent legislative enactment. The defendant brings himself within none of these rules. The petitioner knew all the facts of the case, including the very fact that prevented the appointment of the trustee. The defendant stands on precisely the same ground.

The suggestion that the act of the court prevented the performance is but a more plausible mode of stating the proposition. The appointment of the trustee by the court was refused, because the facts of the case did not warrant such appointment. They had no discretion or power over the subject. The fault was in the petitioner, who wrongfully obtained his release from custody, which was the very case the bond was given to cover.

BRUSH and FITZGERALD, in reply, made two points:

1. Is performance excused by the facts of the case?
2. Are not the plaintiffs estopped by the record of the court, at the time the bond was given, from alleging that Stephen Loines was not two years a citizen of the state?

*Upon the first point, they argued that the order of the [316 court directing the discharge, upon giving the bond, was the basis of the obligation, and it was entered into by the security in good faith, confiding in the truth of the facts set forth in that order. That if in this there was mistake or error, it could not affect the security, nor charge him on the bond. They maintained that upon any other hypothesis, the proceeding was but a trap to deceive and inveigle honest men into unexpected liabilities.

Upon the second point, they contended that the facts set forth in the order first made were conclusive as to the matters decided, and that upon the second hearing the only subject of consideration was the fairness of the petitioner's conduct, and the fidelity of the schedule he might present; that, therefore, the plaintiffs were estopped from alleging the matter of their replication, that the court had made a subsequent order deciding the same facts dif-

Loines v. Phillips.

ferently. The plaintiffs were estopped, and the defendant was not, for this reason. They were parties to all the proceedings; the defendant was neither party nor privy. He could not be concluded by the second order. But had a right to contest the facts upon which it was grounded. To these points they cited 10 Mass. 164; 11 Id. 193; 14 Id. 222; 17 Id. 365; 14 Johns. 81.

By the Court:

The application of a debtor in custody, under the act for the relief of insolvent debtors, in 1822, when this bond was taken, was altogether *ex parte*. It was only after the petition was filed, the order made, and the bond taken, that notice was to be given of the proceedings. The object of that notice was to bring in the parties interested to contest the right of the applicant to the relief sought. The facts assumed in the first order can not, therefore, conclude anybody.

The bond is required in the first place, for the security of the plaintiff in the action, that he shall lose nothing by discharging the defendant out of custody; the security of all the debtor's creditors is a secondary object. The applicant can not be admitted [317] to obtain his discharge upon false *grounds, and then protect himself upon the plea of ignorance. The power of the court to appoint a trustee, receive his assignment, and finally discharge him, depended upon the fact that he had been two years a resident of the state. The court were not bound to investigate this allegation when it was made. But it was the right of those interested to make this investigation when they came in under the notice. Parties were then, for the first time, properly before the court, to litigate the applicant's right to a discharge. The order made, upon that litigation, is the first adjudication between the parties, and it is the first proceeding that concludes them.

The opposition made by the plaintiffs to the appointment of a trustee, and the acceptance of the assignment, is not of that character which discharges the obligation. No act of a plaintiff pursuing and insisting upon his legal rights, can be attended with such a consequence. It is an illegal and a *mala fide* interference on the part of the plaintiff, that excuses the performance. Here the plaintiffs did nothing but require a legal decision upon facts presented to the court. And this they had a right to do without prejudice to any matter in the case.

 Conn v. Doyle.

The applicant voluntarily undertook to do that which he knew the law did not permit. His object was to obtain a benefit for himself to the prejudice of another's rights. For this purpose, he imposed upon the court a statement of facts that did not exist. The truth is elicited, and the applicant's purpose is defeated. This can not be a case where the performance of the undertaking may be excused.

The defendant, Philips, was a security only, and it is insisted that he shall not be prejudiced by an error or mistake of the court. But how can he separate himself from the applicant, his principal? He joined him in the undertaking, and must stand or fall with him. He volunteered his aid to procure the applicant's discharge from custody, at the suit of the plaintiffs. If he did this upon a false statement, surely he to whom it was made, and upon whom it operated so as to produce confidence, ought to suffer, not the plaintiffs, who had no control over the subject, who *legally [318] were not parties, and who reposed no trust whatever. The error of the court was induced by the applicant. It operated to his advantage, and to the prejudice of the plaintiffs. The security, and not the plaintiffs, incurred the risk. The court are all of opinion that the plaintiffs are entitled to recover.

Judgment for the plaintiffs, and the cause remanded to the Supreme Court of Ross county, for an inquiry of damages.

JAMES CONN v. THOMAS DOYLE.

Writ of error and supersedeas from the territorial general court to common pleas, staying proceedings when sheriff has *vendi*. in his hands, judgment affirmed. *Procedendo* from general court to sheriff, authorizing him to proceed to sell, is irregular, and sale under such *procedendo* is void.

A motion was made in the Supreme Court for Hamilton county, by Charles Vattier, for an order on the present sheriff of Hamilton county, successor of James Smith, a former sheriff, to make the applicant a deed for the lot No. 86, in Cincinnati, alleged to have been sold by Smith, as sheriff, upon legal process, to Vattier. The facts of the case, material to be stated, were as follows:

Conn v. Doyle.

At February term, 1801, in the common pleas of Hamilton county, James Conn obtained a judgment against Thomas Doyle for debt and costs, fifty dollars and seventy-three cents. C. Vattier, at the same term, also obtained a judgment against Doyle for debt and costs, thirty-seven dollars and fifty-two cents. On February 11, 1801, a writ of *fi. fa. et. lev. fa.* issued on each judgment. On each of these writs, the sheriff made the same return, that he had levied on the house and lot, No. 86, and held an inquest, which appeared in the schedule annexed to the return. The inquest attached to each writ, found the yearly issues to be of the value of twelve dollars.

On May 12, 1801, a writ of *vendi.* issued on each judgment, upon which the sheriff returned, "stayed by writ of supersedeas from the general court."

319] *In April, 1801, writs, of error were allowed and issued in both cases, and on the 30th of April, writs of supersedeas issued to the sheriff, commanding him, that if final process of any kind was in his hands, or should come into his hands, in the causes stated, he should forbear, and altogether surcease proceedings thereon until the judgment of the general court should be signified to him.

On March 27, 1802, a writ of *procedendo* issued from the general court in the case of Conn and Doyle, directed to the sheriff, reciting the issuing of the writ of supersedeas and the writ of error, and the affirmance of the judgment, and commanding the sheriff as follows: "Therefore, you will now proceed to do execution in the premises, as the law directs, our writ of supersedeas aforesaid, to you before directed, to the contrary thereof in any wise notwithstanding." Upon this writ of *procedendo* is indorsed the amount of damages, interest, and costs, in the common pleas, the costs in the general court, and sheriff's fees, amounting in the whole to ninety-five dollars and ten cents. The sheriff has also indorsed upon this writ as follows: "I have sold the property within referred to, being in-lot No. 86 in Cincinnati, to Charles Vattier, for ninety-five dollars, and have made the money."

It was proved by parol testimony, that Vattier purchased the lot at sheriff's sale, and that the sale was advertised in a newspaper, in the manner prescribed by law.

The question arising upon these facts was reserved for decision here.

Sarchet v. Adm'rs of Sarchet.

CASWELL, for the application.

DODDRIDGE and HAYNES, against it.

By the COURT:

This application is made to us, upon the ground that the writ of *procedendo*, from the general court, was the process upon which the sale was made, and that the Supreme Court of the state now represents that court.

By the judgment of affirmance, upon the writ of error, in the general court, the judgment of the common pleas, *and the [320 proceedings under it, were placed in the situation in which they stood when the writs of error and supersedeas issued. The party was at liberty to sue out a new writ of *venditioni*, upon which the sheriff could proceed as he would have done upon the writ previously superseded in his hands. The *procedendo*, if it were well directed to the sheriff, which is certainly doubtful, conferred no power to sell. It only removed the prohibition interposed by the writ of supersedeas. The authority to sell was originally given by the process of the common pleas; it had been suspended, but was not taken away by the writs of error and supersedeas. The *procedendo* restored it, but did nothing more. If the sale was really made without other process than the *procedendo*, it was made without authority. As no other process issued from the general court, this court, now representing that one, can not make the order asked for. They have no jurisdiction of the subject, and the application must be overruled.

T. AND J. SARCHET v. THE ADMINISTRATORS OF P. SARCHET,
DECEASED.

Where, upon an equitable adjustment of partnership transactions in two parties are in equity, creditor of a third partner, equity will set off such credits against a joint debt due from the same two parties to the third.

THIS case was adjourned from the Supreme Court of Guernsey county. The facts, material to understand the point decided by the court, were as follows:

Sarchet v. Adm'rs of Sarchet.

In May, 1809, Peter Sarchet, whose representatives are the principal defendants in this case, with John and Thomas Sarchet, the complainants, and Thomas Knowles, purchased of Chandler a lease upon the Muskingum salt works. Price, five thousand dollars. One thousand dollars to be paid in hand, and one thousand dollars on the 10th of June, annually, until completed.

The terms upon which the purchasers agreed to carry on the manufactory of salt, were, that they were to be jointly and equally interested.

By an indorsement on the article, dated June 12, 1709, Knowles sold out his interest to Peter Sarchet, who agreed to comply with the article in Knowles' place.

321] *The three Sarchets proceeded to engage in manufacturing salt, and in the course of their business, before 1811, Peter Sarchet sold one-third of Knowles' interest, purchased by him, to Thomas Sarchet, and one-third to John Sarchet. Knowles received what was estimated at thirteen hundred dollars of Peter. Thomas Sarchet paid Peter four hundred and thirty-three dollars and thirty-three cents, one-third of that sum, and John Sarchet agreed to pay the same amount.

Upon the dissolution of the salt manufacturing firm, controversy arose between John and Peter Sarchet, as to John's indebtedness to Peter, for one-third of Knowles' share. John claimed that he was to pay for it out of the profits of making salt; that no profits were made and nothing was due. Peter claimed the whole sum, four hundred and thirty-three dollars and thirty-three cents, as a subsisting debt. Though other private accounts existed, and although the partnership affairs were unsettled, this seems to have been the only item of dispute. They agreed to refer it to men. An arbitration bond, in the penalty of five hundred dollars, submitting all matters in dispute between the parties, was drawn up and executed by John and Thomas to Peter, conditioned that John should abide the award. The arbitrators proceeded to make an award embracing all subjects of controversy between the parties, and specifically and in terms including matters connected with the partnership. It also awarded that John should pay Peter six hundred and thirty-three dollars and thirteen cents in money.

So soon as this award was delivered, an allegation was made by John Sarchet, that it was founded in a great mistake. Explanations took place among the arbitrators, and an attempt was made

Sarchet v. Adm'rs of Sarchet.

to draw them to a re-consideration, but it did not succeed, because Peter was not to be found.

Subsequently the arbitration bond and award were transferred to Loyd Talbot, and a suit prosecuted at law upon the bond, and judgment rendered for the whole penalty. There is nothing in this case to show the character of the proceedings at law.

Peter Sarchet left the country in 1813, and is since dead, insolvent. Pending the litigation upon the arbitration bond Chandler prosecuted two suits against the Sarchets and Knowles, for the purchase money, upon which John and Thomas Sarchet have paid the amount recovered, being *four thousand and seventy-six [322 dollars and sixty-five cents, except one hundred dollars paid by Peter, credited on the first judgment, and five hundred dollars paid on the second by Knowles and others, which was carried to the account of Peter Sarchet, leaving three thousand four hundred and seventy-six dollars and sixty-five cents.

The object of the bill is to be relieved against the award upon the ground of mistake, and if that fail, to off set, against the judgment, the amount paid the Chandler, which was Peter's part of the original purchase money.

The case was elaborately argued upon all the grounds, by Goodenow, for the defendants, and Culbertson and Hammond, for the complainants. But as the court confined their decision altogether to the question of set-off, it is deemed unnecessary to report the argument on the other points.

GOODENOW, for defendants :

I do not perceive how the question of set-off can properly be made in the cause as it presents itself to me in the bill. However, I will meet the question and discuss it as briefly as I can to do it justice.

In the first place, it is to be noted, that all the matters of set-off specified in the bill, have arisen since the submission and award, and most of them since the suit *at law* was commenced; and they are all in *different rights* from the judgment, or the award against which they are offered.

In *Murray v. Toland*, 3 Johns. 569, one item in the bill is, that one defendant, T., had brought suit against the plaintiffs and recovered; and that one of the plaintiffs, M., had a claim on one of the defendants, M., which the plaintiffs claimed to set-off. Upon this point in the cause, Chancellor Kent remarks: "In this case

Sarchet v. Adm'rs of Sarchet.

T. was part owner of the goods, and he held the residue as agent, or factor of M. He dealt with the plaintiffs jointly, as a commercial house, and there was no privity between him and one of the plaintiffs, individually considered. If there could be any set-off allowed in this case, it ought to be of a joint demand of the plaintiffs, and not of theseparate demand of one of them. The plaintiffs assumed, and are responsible for those proceeds in their joint capacity. This fact itself is decisive against the alleged right to retain. The debt demanded, and the debt to be set-off must be 323] mutual, *i. e.*, they *must be due to and from the same persons in the same capacity."

"They must be mutual debts," says the same distinguished chancellor, in *Duncan v. Lyon*, 3 Johns. Ch. 351. "There can not be a set-off, even of a debt against the demand of the plaintiff, unless that demand be of such a nature that it could be set-off by a debt, if it existed in him. This is the settled doctrine in the court of law. *Colson v. Welsh*, 1 Esp. N. P. R. 378. Lord Mansfield said, in *Howlett v. Strickland*, Cow. 56, that not only the statute, but *the reason of the thing*, related to mutual debts *only*, and that unliquidated or uncertain damages, arising from a breach of covenants, were no debts. The same doctrine was held in *Weigall v. Waters*, 6 T. R. 488, and in *Gordon v. Browne*, 2 Johns. 150. The same rule prevails, also, in courts of equity. The courts of law and equity follow the same general doctrines on the subject of set-off."

Although in some cases there appears to have been a practice in the courts of equity in England, under peculiar circumstances, to relax these doctrines, as in *ex parte Stephens*, and *ex parte Hanson*, 11 Ves. 24; 12 Ves. 346, yet this practice only established exceptions to the general rule; and as recently in the case of *Addis v. Knight*, 2 Merivale, 121, the master of the rolls observes, that "in equity, as well as in law, a joint could not be set-off against a separate demand;" and in *Duncan v. Lyon*, where Chancellor Kent collates and comments upon diverse cases beside those I have referred to, he observes, "one judgment may be set-off against another; but here is a demand on one side raised to a debt certain, by a legal assessment, and an uncertain claim on the other, depending on a settlement of accounts."

In *Dale v. Cook*, 4 Johns. Cr. 11, the chancellor repeats the doctrine laid down in *Duncan v. Lyon*. "The debts, or the cred-

Sarchet v. Adm'rs of Sarchet.

its, for credits are considered as subject of set-off, must be mutual and due to, and from the same persons in the same capacity." In the same case the chancellor further remarks, "the cases in which there has been more relaxation in the rule of law, which forbids a set-off between joint and separate debts, are separate cases *in [324 bankruptcy; and it is said that the chancellor's jurisdiction in bankruptcy, relative to set-off, is derived from the statutes of 13 Eliz. and 5 Geo. 11, and is wholly unconnected with the general set-off act of Geo. 11, 2 Maddock's Treatise on the Principles and Practice of Chancery, 512, 515. Even in these bankrupt cases, the departure from the general rule, seems to be questioned, and, at last, prohibited, notwithstanding the statutes of bankrupts embrace mutual credits as well as mutual debts."

In *ex parte* Twogood, 11 Ves. 517, Lord Eldon said, "that he did not understand the reason or the principle" of the decision in the case of *ex parte* Quintin, 3 Ves. 248, in which Lord Rosslyn allowed a party to set off the share of a bankrupt partner in a joint debt, due from the bankrupt individually to him, "for the partnership debts were all actually paid." If, he observed, there be debts which could not be set off at law, must all the affairs of the bankruptcy be suspended, until all the accounts are cleared, in order to see what rights of set-off there may be in the result?

The case *ex parte* Hanson, 12 Ves. 346, which was before Lord Erskine, was this: H. and W. were indebted on a joint bond, H. as principal, and W. as surety, to C. and P., who were bankrupts, and who owned H. The assignee sued H. on his bond, and he applied by petition to be allowed to set off. It was admitted upon the argument that there could be no set-off at law, between joint and separate debts, and the petitioner relied upon *ex parte* Stephens, 11 Ves. 24, which the other side said was decided upon equitable grounds administered in bankruptcy, viz: the fraud. The chancellor allowed the set-off on account of the joint debt being that of principal and surety; and he said that his jurisdiction in bankruptcy was equitable as well as legal. When this cause came again before the court on the Master's Report, 18 Ves. 232, Lord Eldon observed, that the joint debt in that case was nothing more than a *security for a separate debt*. Chancellor Kent, from whom I have taken the above notes, observes, in *Dale v. Cook*, ante, upon all these cases, and some others, which I have not cited, that "they leave the general rule very much as it had existed before,"

Sarchet v. Adm'rs of Sarchet.

325] and adds, "my conclusion *is, that joint and separate debts can not be set-off in equity any more than at law."

CULBERTSON and HAMMOND, for complainants:

Mr. Goodenow very correctly concedes that Talbot has no other right than Peter Sarchet had. How then stands the case between P. Sarchet and complainants? P. Sarchet bound himself to Knowles, to comply with the article to Chandler. Thus, in equity, he became liable to Chandler for one-half the purchase money. John and Thomas Sarchet purchased from Peter two-thirds of Knowles' interest, by which, in equity, the three Sarchets became equally bound to Chandler. Had Chandler compelled payment from Knowles, in equity, he could have compelled the Sarchets to reimburse him: but had not Peter made the contract with Knowles, and subsequently with John and Thomas, Knowles, in case of payment by himself, could have recovered from John and Thomas but half, or, perhaps, but one-fourth from each of them. The sale by Knowles to Peter, and Peter's agreement to pay Chandler, and the subsequent agreement of John and Thomas to become equally interested with Peter in the purchase from Knowles, though it did not change the liabilities of the parties at law, changed them in equity. The three Sarchets were, in equity, debtors to Chandler for the balance of purchase money. That balance was paid by John and Thomas. The five hundred dollars paid by Knowles, though agreed to be credited to Peter, was, in fact, a payment by the three Sarchets, equally, for their interest was equal.

The whole payment was four thousand and seventy-six dollars and sixty-five cents. Peter's one-third is one thousand three hundred and fifty-eight dollars and sixty-six cents. Credit this sum with the one hundred dollars on the first judgment, and the five hundred dollars on the second, leaves seven hundred and fifty-eight dollars and sixty-six cents due to John and Thomas, which exceeds the recovery in this case at law two hundred and fifty eight dollars and sixty-six cents.

It seems to us, there never was a clearer case of equitable set-off. John and Thomas Sarchet owe Peter five hundred dollars upon their bond. Peter owes John and Thomas seven hundred and fifty-eight dollars and sixty-six cents for money paid to Chandler. This could not be set off at law, because at law Knowles stood joined with John and Thomas, as making payment for

Sarchet v. Adm'rs of Sarchet.

Peter. Equity alone *could take notice of the facts which [326 fixed the liabilities of the parties, and exonerated Knowles. The case is strictly one of mutual debts in equity, between Peter, on the one part, and John and Thomas on the other, and is within the doctrine of *Dale v. Cook*, 4 Johns. Ch. 11, and the cases there cited, referred to by Mr. Goodenow.

By the COURT:

The purchase of the lease of the salt works, by the three Sarchets and Knowles, to carry on salt works, constituted them partners. When Knowles sold out to Peter his one-fourth, and Peter sold an equal proportion of that fourth to Thomas and John Sarchet, the three Sarchets became, in equity, partners in the salt works property. Sarchet covenanted with Knowles to perform to Chandler, Knowles' covenant with him, and Thomas and John became parties to this contract, by their subsequent agreement with Peter. In this state of the case, Thomas and John Sarchet, when they paid the whole purchase money to Chandler, could not compel Knowles to contribute his fourth part, because, in equity, Knowles owed nothing. The three Sarchets were the real debtors. Thomas and John owed two-thirds, and Peter one-third. Peter was, therefore, the debtor to Thomas and John, for all the money they paid beyond their own proportion of that contract.

But as between the original parties, no change was made in their respective legal rights. The three Sarchets and Knowles remained bound to Chandler, upon their covenant, for the purchase money; and the new arrangements between Knowles and the Sarchets, was never reduced to such legal forms as to create new legal interests. When suit was prosecuted against Thomas and John Sarchet by Peter, they had not paid the amount due to Chandler, and had they made such payment, a doubt might have arisen whether it could have been set off at law, because it was only by a resort to equity that the true state of their respective interests and liabilities could be determined and adjusted.

If there were no debt due from Thomas and John Sarchet to Peter, and they, having paid the whole amount due *to [327 Chandler, sought to subject Peter to the payment of his proportion, it would be necessary for them to resort to equity, as well upon account of the partnership, as that the contract with Chandler, upon which the payment was made, embraced other parties. In a

Lessee of Walsh v. Ringer.

bill to account by Thomas and John against Peter, it would be sufficient to make Peter defendant, and there can be no doubt that he could have set off his judgment against Thomas and John. This view of the situation of the parties, seems to demonstrate the propriety of allowing the set-off now claimed. It is a case of mutual credits, "due to and from the same persons in the same capacity," and is within the principle laid down in *Dale v. Cook*, relied upon by the respondent's counsel. In *Quintin's case*, 3 Ves. 248, and in *James v. Kynnier*, 5 Ves. 108, set-offs were allowed in equity, which, it was admitted could not be made at law. These; it is true, were cases of a bankruptcy of one of the parties. But in *Dale v. Cook*, Chancellor Kent correctly remarks, that the set-off cases in bankruptcy "leave the general rule very much as it existed before."

Set-off decreed—each party to pay his own costs.

LESSEE OF M. WALSH v. RINGER.

Defendant arrested upon execution for a fine, may surrender land in discharge of his body.

Land surrendered by defendant in discharge of his body, in execution for a fine, may be sold without valuation.

Description in a deed, seventy acres in southwest corner, good, and includes the land in an equal square.

THIS was an ejectment, adjourned from the Supreme Court of Harrison county, upon a case agreed.

Both parties deduced title under James G. Ward. The history of the claim of each is as follows:

James G. Ward owned seventy acres of land situate on the west side of the southwest quarter of section 4, township 12, range 5, beginning at the southwest corner of the section, and lying in an oblong square, extending north one hundred and sixty perches, and east seventy perches, from the southwest corner.

The title of the lessor of the plaintiff was founded upon a sheriff's sale. J. G. Ward was convicted of an assault *and bat-

Lessee of Walsh v. Ringer.

tery, at the November term, 1820, of the common pleas of Harrison county. Upon this conviction, an execution issued against his goods, chattels, lands, tenements, and body, for the fine and costs, amounting to about thirty dollars. This execution was dated May 23, 1821, and upon it the sheriff took Ward in custody. To obtain the discharge of his body, Ward surrendered to the sheriff land, described in the return as follows: "*Seventy acres of land, it being and lying in the southwest corner of the southwest quarter of section 14, township 12, range 5, of the lands sold at Steubenville;*" and it was returned not sold for want of bidders. A *vendi.* was issued to sell the land, and after a succession of writs, it was sold on a *pluries vendi.*, March 8, 1824, without valuation to the lessor of the plaintiff, for thirty-one dollars twenty-five cents. The sale was approved by the court, and a conveyance made by the sheriff to the lessors of the plaintiff, dated April 13, 1824, in which deed the description of the land conforms exactly to the levy.

The defendant claimed under a deed from James G. Ward, for seventy acres of land—described by metes and bounds—exactly including the land owned by Ward—dated August 25, 1821, which was after the surrender to the sheriff of the same land.

BREBE, for the defendant, made three points in objection to the title of the plaintiff's lessor:

1. The body of Ward having been taken in execution, land could not be given up in discharge of it.
2. The sheriff could not sell the land without valuation.
3. The land is not well described in the levy and deed, so as to be sufficiently certain to pass title.

1. He contended that section 36 of the act for the punishment of certain offenses, passed February 11, 1815, under which the execution issued in this case, did not authorize the sheriff to take property in discharge of the body, if the person was once arrested. It gave authority to levy on lands or chattels, and provided a mode of sale where such levy was made. The sale was to be according to the provisions of the act regulating judgments and executions, *then in force, which was the act of 1810, that was repealed [329 before the sale.

This act is only adopted to authorize a sale where levy is made, not where property is given up in discharge of the body. No provision is made for such a case; and it is not a correct argument

Lessee of Walsh v. Ringer.

to maintain, that as the act of 1810, regulating judgments and executions, authorized property to be surrendered in discharge of the body, and directed it to be sold as if levied upon, that this section 36 adopts it for the same purpose, when, in terms, it confines its adoption to other purposes—that is, to the completion of a sale where a levy was made.

The judgment and execution law of 1810, subsequently to its adoption, by section 36 of the act for the punishment of certain offenses, of 1815, was repealed. It would be unreasonable and dangerous to hold, that notwithstanding this subsequent repeal, it was partially in force, by virtue of a previous adoption in another statute.

2. The land ought to have been appraised.

The judgment and execution law of 1820, section 29, provides that lands shall be sold without valuation for the discharge of debts or taxes due to the state. This execution was for neither debt nor tax. Debts arise from contracts, not crimes. The section means debts as they existed before judgment. Why else is provision made specially, in case of fines, for executing property? For debts, property could always be executed.

3. The land is not described with sufficient certainty.

The description in a grant must be sufficient and distinct in itself, so that there can be no question about identity; or the description must be such, that by reference to facts stated in the deed, the land may be identified.

The description here is seventy acres in the southwest corner. How is it to be laid off? Should it be a square or a triangle? Can it be made to include seventy acres off the west side? The cases upon this subject proceed upon the ground, that where, in the description of the deed, circumstances are mentioned, you may investigate such circumstances to identify the land conveyed. But here no circumstance is mentioned. The description is of a single insulated fact. "Lying and being in the southwest corner."

330] *GOODENOW, for plaintiff, contended that the law authorized a levy upon land for fines, and the execution issued against the lands as well as the body. Admit it were irregular in the sheriff to seize the body, and discharge it upon a surrender of lands, yet, as the execution was against lands, the purchaser at the sheriff's sale was not bound to inquire into every step taken by the sheriff,

Lessee of Walsh v. Ringer.

on such an execution. Besides, where a defendant voluntarily surrendered his real estate, and it was sold with his own consent, and by his agreement, he could not be heard afterward to object against the purchaser's title.

The repeal of the judgment and execution law of 1810, can not affect the case. It is referred to and adopted in the law for the punishment of offenses, as directory to a ministerial officer; and its directory provisions exist by virtue of the act that adopts them, whether in force for other purposes or not.

The third objection interposed by the defendant to our recovery, is a want of description of the land.

The court in this case by the agreement of the parties, are to perform the offices both of judge and jury; hence they not only decide what construction the grant or deed of the sheriff is to receive, but also what, as a matter of fact, was intended by the parties as to all questions of location, there being nothing in the description contained in the deed destructive of itself. "Uncertainty as to the application, abstracted from the question of law, must unavoidably exist as to all grants; for it will be readily comprehended, that it is not possible to make a grant of any parcel of land, by metes and bounds, defined with perfect accuracy, which a stranger, totally unacquainted with the objects of the grant, but from its import, and unacquainted with the country contiguous to it, can locate without acquiring a certain portion of knowledge for that purpose extrinsic the grant." *Frier v. Jackson*, in Error, 8 Johns. 495.

Now what is the description here? Seventy acres in the southwest corner of a well known tract of land. What was intended? Ward owned seventy acres only in that quarter, and all lying in a body. He describes the seventy acres as lying in *the [331 southwest corner. Had he described them as the seventy acres which he possessed in that quarter, there could have been no doubt. Can there be any doubt now? Ward owned and possessed seventy acres, lying on the west side of the quarter, extending from the southwest to the northwest corner, and thus embracing and lying in both corners: instead of so describing it, he describes it as seventy acres lying in the southwest corner only. Can there be any mistake, any uncertainty, any ambiguity?

In *Blaque v. Gold*, Cro. Car. 447, 473, there was a devise of a house, called the corner house in Andover in the tenure of B. and

 Lessee of Walsh v. Ringer.

H., whereas it was in the tenure of B. and N., the deviser having a house thereto near adjoining in the tenure of H., and it was held to be the corner house in the tenure of B. and N. for that the devise sufficiently ascertained the thing, by the words "*corner house*," and the addition of tenure was surplusage.

This doctrine is considered by the court in New York, as equally applicable to *deeds* as to *devises*; and is cited by Spencer, J., in delivering the opinion of the court, in the case of *Jackson v. Clark*, 7 Johns. 217, to illustrate this rule, therein relied on by the court, as having "been settled with great wisdom and accuracy." "If there are certain particulars once sufficiently ascertained, which designate the thing *intended to be granted*, the addition of a circumstance, false or mistaken, will not frustrate the grant." Certainly, then, if a tract of land *intended to be granted*, is described by certain particulars, sufficiently ascertained, the description is none the worse, because there is no false or mistaken circumstance contained in the grant: and in the instance before us, the construction of the sheriff's deed ought to lie as strongly against Ward, as if he had made the grant himself, for he voluntarily surrendered, and the sheriff took his description, and it lies not in his mouth to say he committed a fraud upon the officer, nor does it lie in the mouth of his grantee to hold the same language to the purchaser at the sheriff's sale, for the return upon this execution, made to the court and filed with the clerk, on July 30, 1821, long before the execution of the deed to the defendant was notice "to all the world."

332] *If a man convey all the land in his possession in the township of W., what he actually possesses in that township will pass; 5 East, 51; 8 East, 91; 14 Johns. 1, and if he had delivered to the sheriff just such a description upon a *ca. sa.* for the purpose of discharging himself from the iron grasp of the law, the sheriff's sale by that description would be sufficient; though an ordinary *levy*, so described by the sheriff, *might* admit a different construction. If a deed correctly describe land by its occupiers, and quantities, though it describe it as being in a parish in which it is not, the land will pass by the deed. *Lambre v. Redstone and wife*, 5 Taunt. 207.

In the case of *Jackson v. Gardner*, 8 Johns. 397, a question arose as to the location of a tract of land mentioned in a lease which had been destroyed, in which a witness said the land was described

Lessee of Walsh v. Ringer.

as "two hundred acres in the southeast corner" of a certain lot. It appears clearly, by the opinion of the court, that had Hamilton, the lessor, possessed only the two hundred acres in the "southeast corner," there would have been no doubt or difficulty about the location. In the case now before the court, we prove that, in the *quarter* out of which we claim the seventy acres, Ward owned that quantity, and that only, and in the southwest corner. In the case I have cited above, from New York, the court say, the plaintiff ought now to be confined to such location of the two hundred acres, in and adjoining the southeast corner of the lot, as can be "made consistently with the defendant's right," the lessee himself having been instrumental in the destruction of the lease, which "shrouded the question of location in absolute uncertainty;" and for that reason the court say, "every difficulty and presumption ought to be turned against him."

By the Court:

We entertain no doubt but that upon an execution, in a case like that against Ward, the defendant, if arrested, may surrender land to the sheriff in discharge of his body. This surrender the sheriff may accept, and when accepted the effect of the proceeding is the same as that of a levy. It is a legal appropriation of the land to satisfy the execution. *No subsequent disposi- [333] tion of it, by the defendant, can pass a title so as to defeat and divest the interest attached by the execution and the proceeding on it.

We think, too, that judgments for pecuniary fines are debts due the state, within the meaning of the law authorizing, in such cases, the sale of lands without valuation, and that lands, surrendered to obtain a discharge of the body seized in execution, are to be sold in the same manner as if levied upon by the sheriff in the first instance.

The description of the land is in general terms. Seventy acres, being and lying in the southwest corner. The defendant contends that this description is so vague and uncertain as, for that reason, to be void and inoperative. On the other hand, the plaintiff contends it is a good description to convey seventy acres of land, commencing in the southwest corner, and extending on the west line to the northwest corner in an oblong square. Neither of these constructions can be maintained.

The general position of the land conveyed is given with suffi-

Lessee of Walsh v. Ringer.

cient certainty. It is in the southwest corner. According to the rules of decision, both in this state and in Kentucky, that corner is a base point from which two sides of the land conveyed shall extend an equal distance, so as to include, by parallel lines, the quantity conveyed. From this point the section lines extend, north and east, so as to fix the boundary west and south; the east and north boundaries only are to be established by construction, and the rule referred to gives them with sufficient certainty.

It is argued for the lessor of the plaintiff, that the court, performing in this case the functions of a jury, are to decide not only the *construction* of the deed but the intention of the parties. Where there is no ambiguity in the description the construction of the terms employed is matter of law, independent of the intention of the parties. And here, upon legal principles, there is no ambiguity. Had the description been "seventy acres on the west side of the quarter," the whole west line must have been considered the base line of the tract, and the quantity laid out in an oblong square. It would have been a violation of the plain legal [334] sense of the terms used, to lay out the land in a square, *at either corner, upon parol proof that such was the intention of the parties. So, in this case, no proof can justify us in giving an interpretation, by which terms, that locate the land in a square at the southwest corner, shall be made to locate it on the west side. The plaintiff must have judgment for so much of the land in dispute, as may be included by a line, north from the southwest corner, such a distance that the parallel lines of a square with four equal sides will include seventy acres.

NOTE BY THE EDITOR.—See, as to description in sheriff's deed, iii. 272. ("The Five Points.") Parol proofs may be introduced to identify the description in the levy with that in the deed, iii. 272; v. 522; vi. 536; xvi. 16, and cases cited.

SAMUEL THOMPSON v. YOUNG AND WIFE, AND SURVIVING EXECUTORS OF J. M'INTIRE, DECEASED.

Charter of a bank extended, and no new security taken of the cashier. Securities under the first charter not liable for defalcations under new charter. Judgment at law against three or four securities, in a suit where the fourth was no party. In bill for contribution, fourth security is not concluded.

THIS case was reserved from Muskingum county. It was a bill in chancery to compel contribution, upon the following state of facts:

In the year 1811, the Bank of Muskingum was incorporated, the charter to continue from its passage until January 1, 1818. The company was duly organized under this charter, and D. J. Marple appointed cashier. Isaac Vanhorn, Jeffrey Price, Samuel Thompson, and John M'Intire, executed with Marple, as securities, a bond in the penalty of twenty thousand dollars. And Marple proceeded to discharge the duties of cashier.

Before January 1, 1818, the legislature passed a law extending the charters of existing incorporated banks, until January 1, 1843, upon certain terms and conditions; and with these terms and conditions the Bank of Muskingum complied, and Marple was continued cashier, without either a new appointment or a new bond.

In 1815, M'Intire, one of the securities, died. In 1819, Marple became a defaulter to a large amount; and suit was commenced against Marple, Vanhorn, Price, and Thompson, the surviving obligors, and judgment obtained against *them for the [335 amount of the defalcation. At the trial no evidence was given of any default before January 1, 1818. Thompson, the complainant, having paid one-third of the judgment, brought this bill against the devisees and executors of M'Intire for contribution. The facts were presented by a plea, to which the complainants excepted.

GODDARD, for the defendants, in support of the plea, maintained:

That the securities could not be charged with any defalcation that took place, after the expiration of the first charter, under which the appointment was made, and the bond given. He cited

Waddle and McCoy v. Bank of the United States.

2 Saund. 411; 2 Black. 934; 3 Wils. 530; 1 Term, 291; 3 East. 484; 1 New Rep. 34; 2 New Rep. 175; 6 East. 507; 2 Camb. 422; 12 East. 400; 2 Maul. & Sel. 363; 2 Camp. 39; 2 Barn. & Al. 431; 1 Bing. 452; 2 Bing. 32; 9 Wheat. 720; 8 Mass. 275. He further contended that the judgment at law, against the complainants, did not conclude the defendants, who were not parties to that cause and had no agency in the defense made.

No argument was presented on the other side.

By the COURT:

The authorities adduced by the defendants are conclusive that the securities were not bound for any defalcation that took place after the expiration of the first charter. And we hold them to be in accordance with the soundest principles of justice.

It is equally clear that the defendants can not be concluded by an adjudication in a case where they were not parties. The bill must be dismissed.

336] *WADDLE AND MCCOY v. BANK OF THE UNITED STATES.

Application in chancery for a new trial at law, refused, by difference of opinion among the judges.

THIS case was reserved for decision at Columbus, by the Supreme Court in Ross county. It was a bill in chancery, to obtain a new trial at law, under the following circumstances:

The complainants indorsed a note for M. W., which was discounted and renewed for some time at the office of discount of the Bank of the United States, at Chillicothe. It was at length protested for nonpayment, and suit brought against the indorsers. At the trial of that suit, the bank made no proof of demand of the drawer, and notice of nonpayment to the indorsers. But in the place of this proof, gave in evidence a deed of trust

†NOTE BY THE EDITOR.—For discharge of sureties by principal, see McDowell v. Buttles, ii. 303, and cases cited in note to that case. When records of former recovery evidence in subsequent suit, see Gibles v. Fulton, ii. 180, and note to that case.

Waddle and McCoy v. Bank of the United States.

from M. W., made for the security of the indorsers, upon a tract of land equal in value to the debt. And upon this evidence the bank recovered a verdict and judgment against the indorsers.

Subsequent to this recovery, J. H. prosecuted a bill in chancery against Waddle and McCoy, upon a previous mortgage given by M. W. to him, on the same land, charging Waddle and McCoy with notice of such previous mortgage. In their answers, they denied notice. But on the hearing of the bill, the court decided that they were chargeable with notice, and decreed against them. The mortgaged premises were subjected to the payment of the debt to J. H., and nothing was left for the indemnity of Waddle and McCoy. The bill was filed to obtain a new trial, upon the ground that facts of subsequent occurrence, and which could not have been proved at the trial, rendered the verdict iniquitous and unjust.

LEONARD and ATKINSON, for complainants, argued that complainants were entitled to the relief prayed by the bill.

The case at law was decided upon the authority of 5 Mass. 170. That was a case where the maker of the note had assigned all his property to the indorsers, and was himself insolvent. Notice could avail the indorsers nothing. The rule, as now settled, seems to be, that to charge the *indorsers, without notice of de- [337 mand and nonpayment, the indemnity must be a complete and sufficient one.

If the indemnity was really worth nothing, the indorsers were erroneously and wrongfully charged. And the fact of the insufficiency being subsequently established, entitles the party to a new trial, which can only be had in equity. They cited and examined the numerous cases where relief had been granted and refused. 1 Mad. Ch. 64; 9 Ves. 275; 2 P. Wms. 424; 7 Term, 265; 1 Scho. & Lef. 201; 1 Johns. Ch. 91; 14 Johns. 63; 1 Johns. Cas. 436; 1 Johns. Ch. 320; 1 Chan. Cas. 43, 63; 2 Johns. Ch. 228; 2 Johns. Cas. 319; 5 Johns. 249; 9 Johns. 78; 2 Binn. 582; 1 Wash. 8; 2 Wash. 36, 255; 2 Hen. & Mun. 139; 4 Hen. & Mun. 369; 1 Bibb, 73, 252, 354; 2 Bibb, 550; 2 Ver. 146.

They contended that relief ought to be granted by way of new trial at law, in all cases where bill of review would be allowed in equity, in relation to matters of fact; and cited to these points. 3 Johns. Ch. 124; 1 Johns. Cas. 502.

Waddle and McCoy v. Bank of the United States.

They argued that the decree between J. H. and Waddle and McCoy was admissible evidence in this case, and *prima facie* proof of the invalidity of the indemnity. That although this decree might be impeached by the bank, who was no party to it, for fraud and collusion, yet not being so impeached in the answer, the bank was bound by it.

The insufficiency of the indemnity resting upon the fact of notice, the complainants could not prove that fact upon the trial at law. Their own admissions could not be received for their own defense; and besides, as trustees, they could not be permitted to do an act that would prejudice the *cestuy que trusts*. The indemnity would, in equity, be made subject to the use of the bank, and, therefore, the complainants were bound to silence.

What notice would be sufficient to charge a party, when that notice is implied and not direct, is a nice question, and one which could not properly be tried in the case between the bank and the indorsers.

The previous mortgagee was no party, and no decision of the case would preclude him. The jury, upon the evidence before them, might find there was no notice. A court of chancery, at the 338] suit of the previous mortgagee, *might find differently. It was, therefore, not competent to try the value of the indemnity in the case of the bank against the indorsers; and it being subsequently taken away entitled complainants to relief.

GRIMKE, for respondents, insisted:

That the record of the case of J. H. v. Waddle and McCoy was not admissible evidence against the bank, who were neither parties nor privies; but that if admitted, then it proved that the complainants, at the time of the trial, had notice of the invalidity of the indemnity. That the decree against them was predicated upon the fact that they had notice when indemnity was taken; consequently their failure to avail themselves of it in their defense was a neglect against which equity can not relieve.

He examined the cases cited by complainants' counsel, and cited in addition 1 Johns. Ch. 49, 324, 465; 3 Atk. 223; Pre. Chan. 193; 1 Ver. 176; 2 Chan. Cas. 95; 2 Atk. 319; 9 Wheat. 532.

The complainants ought to have disclosed the fact of notice that invalidated their indemnity at the time of trial. Had they done so, the bank, no longer looking to the indorsers or the indemnity,

Doe v. Gibson and Jolley.

might otherwise have secured themselves, it being in proof that M. W. had other property. The failure to make this disclosure works a prejudice to the bank, and properly casts the loss upon the complainants.

The Court were equally divided upon the question of relief, so the bill was dismissed, but no opinion given.

*DOE, ON THE DEMISE OF THOMPSON AND OTHERS, v. GIBSON [339
AND JOLLEY

Plaintiff in ejectment showing the original grantee to be within the exception of the statute of limitations, proof that others deriving interest under the grantee are not within such exception, is unnecessary. If relied upon to defeat recovery, it must come from the defendant.

Quære, whether English statute of uses was ever in force in Ohio?

THIS case was adjourned from Highland county. It was a motion by the defendants for a new trial where a verdict passed *pro forma* upon the following facts:

The plaintiffs deduced title from a patent to Ann Byrd, administratrix of Otway Byrd, deceased, with the will annexed, in trust for the uses and purposes declared in the last will and testament of Otway Byrd, deceased. This patent was dated January 31, 1803. It was admitted to include the lands in question, and it was also admitted that Ann Byrd, the patentee, resided in Virginia, and had never been in Ohio. There was no proof before the court of the nature of the bequests in the will of Otway Byrd, and none that any of the persons for whose use the lands were granted had ever been in Ohio, or where was their place of residence.

For the defendants it appeared that they claimed title to the lands under a patent dated February 23, 1810, founded upon a survey made April 27, 1800; that under this claim of right they took possession in the year 1803, and had ever since remained in possession. The ejectment was brought in 1825.

Doe v. Gibson and Jolley.

BRUSH, FITZGERALD, and COLLINS, for defendants :

In support of the motion for a new trial, relied upon the act of limitation of 1804, which limits the bringing of ejectment to twenty-one years where there is an actual adverse possession.

They maintained that Ann Byrd, the patentee, did not take the legal title, but that in virtue of the statute 27 Hen. VIII., chap. 10, for the direction of uses and trusts, the legal title vested in the devisees of the will of Otway Byrd. And the plaintiffs not having shown where these devisees resided, or that they resided out of the state, had not brought themselves within the proviso of the statute, and could not recover.

They contended that the statute of uses was in force in 1803, when the grant to Ann Byrd emanated by special adoption 340] *of the governor and judges, and also upon general principles. They cited 1 Swift Dig. 133; 2 Swift Dig. 104, 105; 2 Blac. Com. 327; Kirby, 368; 6 Mass. 31; 7 Mass. 189; 12 Mass. 104, 108; 14 Mass. 491.

Having proved the defendants' possession, so as to bring them within the statutory bar, it was incumbent on the plaintiff, and the burden of proof was thrown upon her, to make a case which would bring her within the exceptions of the act. 4 Wheat. 230, 234.

Statutes of limitation are beneficial, and are to be treated as statutes of rest and repose. 4 Term, 308; 1 W. Black. 287; 5 Bin. 580; 8 Cranch, 74; 15 Ves. 192.

BOND, for plaintiff, denied :

That the statute of uses was ever in force in Ohio, so as to vest the legal estate conveyed to a trustee in the *cestuy que trust*. He maintained that if the right of the patentee was saved, all rights dependent upon or derived from that right were also protected. "Beyond sea" and "out of the state" are analogous terms. Cranch, 176; 3 Wheat. 541; 2 Bibb, 207.

It is settled that in the case of a public grant, no matter when the possession commenced, the statute only begins to run at the date of the grant. 2 Marsh. 506. So where the grantee is protected the statute can only begin to run at the date of the conveyance from the grantee.

 Courcier and Ravises v. Graham.

The COURT were divided in opinion upon the point whether the statute of uses, 27 Hen. VIII., chap. 10, had ever been in force in Ohio. Two judges held that that statute was in force in Ohio from 1795 to January, 1806, for all the purposes that it was in force in Virginia or England. The other two judges held differently.

But the judges were unanimously of opinion that, it being shown that the grantee, Ann Byrd, was within the exception of the statute, it was incumbent on the defendants to show that those whose interest was dependent on hers were not within the exception. Consequently the motion for a new trial was overruled, and judgment given for the plaintiff.†

 *COURCIER AND RAVISES v. THOMAS GRAHAM. [341

In decreeing specific performance, equity can not apply the doctrine of abatement or compensation to the defendant, so as to compel him to accept a less or pay a greater price. Decree upon such principles is erroneous.

THIS was a writ of error, brought to reverse a decree of the court of common pleas of Hamilton county, pronounced in favor of the defendant in error against the plaintiffs in error, and was adjourned from the Supreme Court in Hamilton county. The case was this :

In the year 1818, Graham made a contract with Courcier and Ravises, to sell them a tract of land, near Cincinnati, at a price per acre to be fixed by men chosen by the parties, and to be paid for in merchandise in Philadelphia. Merchandise estimated at eleven thousand four hundred and eighteen dollars thirty-two cents was delivered to Graham on the contract. The land, containing one hundred and two acres, was subsequently valued under the contract at three hundred dollars per acre. Exception being taken to the title, Courcier and Ravises sued upon the contract at law for the amount of merchandise delivered, and recovered. Graham brought his bill in equity to enforce a specific performance of the

†NOTE BY THE EDITOR.—English Statute of Uses never in force in Ohio, vii. 275, part 1.

Courcier and Ravises v. Graham.

contract. The court of common pleas decreed a performance upon terms. The decree reduced the price of the goods delivered thirty-three and a third per cent., and the price of the land thirty-three and a third per cent., and decreed the balance of purchase money to be paid in cash. The general error was assigned.

GAZLAY, for plaintiff in error:

This decree is erroneous for several reasons:

1. It does not direct a specific performance of the contract between the parties, but makes a new contract, which a court of chancery can not do.

2. It is in the nature of a new assessment of damages, in an action at law, the court substituting their assessment for that of the jury, which is unheard of.

3. It is setting aside a judgment at law, and making a decree in its place.

4. It does not give the defendant the right to pay in merchandise as the contract did, but directs payment in cash. And in case of failure, a sale of the land to raise the money.

342] *The rules that govern courts of equity, in decreeing specific performance, are distinctly laid down and explained in Sugden's Vend. 153, 172, 277; New Con. 342, 346, 89, 214; Coop. Eq. 133.

C. HAMMOND, for defendant in error:

The exceptions taken to the decree exist not so much in the decree itself, as in the reading which it suits counsel to give it.

The doctrine of compensation and abatement in decreeing specific performance, is as old as that of decreeing specific performance itself. So is the doctrine of decreeing the performance of contracts, not according to their literal terms, but according to circumstances that exist at the time of the decree. It is settled that "under the head of specific performance contracts substantially different from those entered into have been decreed." 6 Ves. 677; 10 Ves. 605; 13 Ves. 73, are to the same point.

The decree proceeds upon the doctrine of the cases here cited, and they furnish answers to all the objections, which are in fact but the same objection, in a different form of words.

By the Court:

This decree is erroneous. As we understand the doctrine of compensation, abatement, and modification, it is this. The com-

Sterret v. Creed.

plainant asks for a decree, and it may be granted to him upon terms. He may be told that he shall take less or give more, and to do so or not, is at his own option. But the court can not tell the defendant that he shall take less or give more, because to tell him so gives him no option whatever. In this case it was competent for the court to decree a specific performance at the request of Graham, upon the terms of abating thirty-three and a third per cent. in the price of the land. But the court had no power to reduce the price of the merchandise. The decree must therefore be reversed, and we retain the cause for further hearing on the whole merits.†

*BRICE J. STERRET v. JOHN CREED.

[343]

Verdict against plaintiff in error for \$10,953 no *remittitur*. Judgment for \$6,500, no ground to reverse judgment.

THIS was a writ of error to the court of common pleas of Fairfield county, reserved for decision here by the Supreme Court sitting in that county. The principal and only material error assigned was that the judgment did not agree with the verdict. It was an action on the case, by a subsequent against his immediate previous indorser, on a negotiable promissory note. The jury found a verdict for ten thousand nine hundred and fifty-three dollars; the judgment was for six thousand five hundred dollars, and the record contained no *remittitur* of any part of the damages assessed by the jury. The defendant sued the writ of error.

IRWIN, for plaintiff in error:

It is the province of the jury, or of the court, by consent of the parties, to assess the damages. If the jury assess damages, not warranted by the proof in the case, the court may grant a new trial, but can not render judgment for any other sum than that found by the jury. To do so would, in fact, be a new assessment

†NOTE BY THE EDITOR.—See Townsend v. Alexander, ii. 18, and note to that case.

Sterret v. Creed.

of damages. The question is not who is benefited, but have the court power? 4 Bac. 490.

If judgment be rendered for a sum exceeding the amount of the award it is error. 2 Johns. Cas. 66.

If the error assigned be the *act of the court*, it is immaterial whether it is beneficial or detrimental to the party assigning it. The judgment should be reversed. 8 Coke, 58; 1 Swift's Dig. 791; 3 Bac. 772; Cro. Ja. 211; Cro. Eliz. 84.

EWING, for defendant in error;

Writs of error, like other writs, are allowed for the purpose of redressing injuries, and only lie in favor of a party who has been injured by the erroneous judgment of an inferior court. And it is settled that a man shall not reverse a judgment for error, unless he can show that the error is to his disadvantage. F. N. B. 21, F.; 5 Rep. 29, 86.

344] *Before the statute of jeofails, the exceptions to this rule were, in cases where the form of the judgment was erroneous, as "in *miserecordia*," instead of "*quod capiatur*." The reason for this was altogether technical and peculiar to the jurisprudence of the times, as explained in 8 Rep. 59. And it is to cases of this character that the authorities refer when they speak of the act of the court. He cited 2 Saund. 101; 3 Saund. 257; 2 Bac. 223; Yel. 45; 8 Johns. 76; 2 Johns. Cas. 66; 2 Johns. 46; 3 Caine, 218; 4 Term, 510; 4 Bibb, 182; Hard. 77.

By the COURT:

No case is cited to us; we have found none in which a judgment has been reversed for error manifestly beneficial to the party that asks the reversal. Had the plaintiff below, in this case, asked for a reversal we should be bound to reverse; for, on the record, the judgment is to his prejudice. But the plaintiff in error has no ground of complaint. The cases cited by the counsel for the defendant in error, and the reason of the thing, unite in proving that a judgment ought not to be disturbed for an error beneficial to him who complains. He is not injured, so that his request is in contradiction to the allegations of the writ, that *error has intervened to his prejudice*. It is, in fact, to his advantage. There is a wide difference between a judgment in favor of a party and error in his favor. A man may be *prejudiced* by a judgment

Day v. Brown.

in his favor, where it is not for the thing he asks, or for less than he asks. But he never can be *prejudiced* by an error in his favor, such as rendering judgment against him for six thousand five hundred dollars, instead of ten thousand nine hundred and fifty-three dollars.

There may be cases where the court would feel justified in reversing a judgment for errors, apparently beneficial to the plaintiff in error. But this is not one of them. The judgment must be affirmed.†

*MARK DAY v. ROBERT BROWN.

[345

Where the clause of a deed containing the covenant of seizin is blank as to the names of those who are seized, it does not amount to a covenant of seizin by the grantors.

Covenant to warrant and defend, "as executors are bound by law to do," is not a personal covenant.

Quære, whether covenant of warranty can be sustained without eviction under the act declaring the law in certain cases of covenants real.

THIS was an action of covenant, and was reserved for decision here in Clermont county. The declaration contained two counts: one on a covenant of seizin; the other on a covenant of warranty, but without any averment of eviction. The defendant cravedoyer of the deed, and demurred generally; the plaintiff joined in demurrer.

The deed, as set out, was a conveyance from David and Robert Brown, executors of George Brown, deceased, and was a common printed blank, in the usual form, with covenants of ownership and warranty, except in filling up the blanks. The covenant of ownership was as follows: "And the said David Brown and Robert Brown, executors, for heirs of George Brown, deceased, do covenant, grant, and agree to, and with the said Mark Day, that the true and lawful owners of the premises," etc.

†NOTE BY THE EDITOR.—That can not be assigned for error by which the party assigning it would gain, xii. 112, 210; xiii. 131. This rule not applicable to errors of the court, ii. Swan's Prac. 1136, and cases cited.

Day v. Brown.

The deed being blank where the points are inserted. The covenant of warranty was that the grantors would warrant and defend the premises, as executors are bound by law to do, etc.

COLLINS, in support of the demurrer, contended :

1. That the deed contained no covenant of seizin or ownership.
2. That the defendants had not bound themselves by any personal covenant.
3. That as no eviction was alleged, the count upon the covenant of warranty was bad.

Upon the first point, he relied upon the reading of the deed. The blank left it wholly indefinite as to who it was that stipulated, and who it was that were owners.

On the second point, he maintained that the whole deed should be read in order to ascertain the extent of its covenant. General words may be narrowed according to the intention of the parties appearing upon the whole deed. 1 Inst. 313; 2 Bos. & Pul. 13; 3 Bos. & Pul. 565; 4 Dallas, 440. On the third point, he cited 1 Ohio, 389.

346] *FISHBACK, for plaintiff, insisted :

That the deed contained a covenant of ownership or seizin, notwithstanding the blank. The terms, "have good right, full power, and lawful authority to sell," show clearly that it is the grantors who speak and make the stipulation.

As to the liability of the defendants, he contended that the insertion of the terms "as executors are bound by law to do," did not control the former covenant of general warranty, which bound the grantors personally. Duval v. Craig, 2 Wheat. 56; Sumner v. Williams, 8 Mass. 162.

He also urged that the case cited by defendant, from 4 Dal. 440, sustained his own position rather than the adverse one.

The case from Ohio Reports is one where there was a covenant of seizin; if, in this case, there be no covenant of seizin, the doctrine of that case does not apply, and the action is sustainable under the statute.

Opinion of the court, by Judge BURNET :

The declaration filed in this case contains two counts: one on a covenant of seizin—the other on a covenant of general warranty.

Day v. Brown.

The defendant has craved oyer of the deed, and demurred generally, and contends :

1. That the deed does not contain a covenant of seizin.
2. That the action can not be sustained against the defendant in his private character, but as executor only, if it can be sustained at all.
3. That the second count being founded on a covenant of general warranty ought to contain an averment of eviction.
4. That there is a material variance between the declaration, and the deed on which it is founded.

1. That part of the deed which is set out and relied on as containing a covenant of seizin is insensible and contains no covenant, or undertaking of any description. If any meaning can be attached to it, it is, that the defendants covenant for the heirs of G. Brown, that some person not named is the true and lawful owner of the premises ; and to make out even that meaning, it will be necessary to supply *words not contained in the deed. [347 It is true that the blank might have been so filled up, or such words might have been inserted in the deed before its execution, as would have amounted to a covenant, but as this was not done, the legal and natural inference is, that it was not the intention of the parties that such a covenant should be created. The liability of these defendants must depend on the terms they have used, and not on those they might have used. There are no cases in which the omission of a word, in the draft of a contract, will be supplied, where it appears to have been occasioned by accident, or mistake, and the meaning of the parties is sufficiently apparent, but the inference naturally arising in the case is, that the parties omitted to fill the blank in the part of the printed form calculated for a covenant of seizin, because they did not intend to have such a covenant in the instrument. But be this as it may, the deed does not contain the covenant set out in the first count, and we do not perceive anything on the face of it, from which the intention of the parties can be so ascertained as to authorize us to supply the omission. It is very evident, that the latter clause of the sentence, " have good right, full power, and lawful authority to sell and convey, in manner aforesaid," relied on by plaintiff's counsel, does not remove the difficulty, because there is nothing preceding those words that points out the person of whom they are predicated. They were intended to apply to the person who should enter into

Day v. Brown.

the covenant, but as the name of no person has been inserted, they are words without meaning.

2. The second ground is, that if the covenant of a general warranty binds the defendants at all, it does not bind them in the character in which they are sued.

It appears from the deed that the defendants were the executors of the last will and testament of George Brown, deceased; that the land described in the deed was a part of his real estate; that the deed was executed in obedience to an order of the court of probate by the defendants, in their character of executors, and that the object of the deed was to pass the title of the testator, and nothing more.

In the covenant of warranty, they bind themselves as executors to warrant and defend the premises as far as *executors are bound by law to do*.

348] *The plaintiff's counsel contends, that on this covenant the executors are personally bound, and are liable to answer the damage from their private funds, and he relies on the case of *Duval v. Craig*, 2 Wheat. 46, and the authorities there cited. The principle on which this point was decided in that case admits of no doubt. Trustees and agents may bind themselves personally, and subject their private funds, though they are under no obligation to do so, and if they do so bind themselves, they will be held to their contracts, notwithstanding their fiduciary character clearly appears. A person may describe himself as executor, or trustee, and yet bind himself as firmly and as extensively as if that description had been omitted.

The terms that are used in a contract to show the character or relation in which the parties stand, may be so used as to amount only to matter of description, or they may be so used as to limit and qualify the extent of their liability. In the cases referred to, the former was the fact, and the defendants were held personally responsible. But there is a striking difference between those cases and the one before us. Here the defendants not only describe themselves as executors of George Brown, professing to convey the title which he held at the time of his death, in pursuance of an order of the court of probate, but they expressly qualify and limit the operation of their covenant, so as to show that it was not the intention of either party that they should be personally bound. They undertake that they will warrant the title, *as far as*

Day v. Brown.

executors are bound by law to warrant, but the statute under which the order was made, and the deed was executed, does not require them to warrant in any form, or to any extent.

It can not be necessary to consider the authorities cited, to show that contracts are construed according to the intention of the parties, and that the intention must be gathered from the whole contract, nor will it be contended that the clause qualifying this covenant can be rejected. The terms used in that clause show it was not the understanding of the parties that the defendants were to be personally bound, which is decisive of the present question.

*3. The third ground is, that the count on the covenant [347 of general warranty does not contain an averment of eviction.

It has already been decided in this case, that this deed does not contain a covenant of seizin, consequently the validity of the third objection will depend on the interpretation of section 1 of the statute "declaring the law in certain cases of actions upon covenants real." In *Innes v. Agnew*, 1 Ohio, 389, it was decided by this court that this section did not apply to deeds, which contained a covenant of seizin, but to such only as contained a covenant of warranty, without a covenant of seizin. The question now presented is, does it, in such cases, authorize the action without averring an eviction. Such was probably the intention of the legislature, but it seems to admit of serious doubts, whether that intention is sufficiently expressed. The first part of the section authorizes an action of covenant on a deed containing covenants of general warranty, in the same manner as if the deed had contained also a covenant of seizin. Thus far the statute does not change the common law. The latter part of the section provides that such action may *in like manner* be commenced before the grantee shall have been evicted, etc. Now, as the former part of the section authorizes the action on the covenant of warranty *in the same manner* as if the deed had contained *also* a covenant of seizin, the question may be made, whether the phrase *in like manner* in the second part, does not mean *in the same manner* as if the deed had also contained a covenant of seizin, or, in other words, whether this be not the fair construction of the section, that on a covenant of general warranty in a deed, which does not contain a

Day v. Brown.

covenant of seizin, the grantee may maintain an action of covenant, in the same manner as he might have done, at common law, if the deed had also contained a covenant of seizin, and that such action may be commenced before eviction, *in like manner* as it might have been commenced at common law, before eviction, if the deed had contained *also* a covenant of seizin. But it has not been thought necessary to decide this point, as the case is fully 348] disposed of without it. For the same reason, I shall forbear any remarks on the fourth and last point.

It is the opinion of the court that on the first and second grounds, the demurrer must be sustained.

Judgment for the defendant.†

†NOTE BY THE EDITOR.—The statute upon which the last branch of this decision was made was repealed, but re-enacted substantially in 1824, Chase, 1368, and this was entirely repealed in 1831, 29 Ohio L. The decisions under this act are, i. 389, the above case, and iii. 525. The law, as it now seems to be settled by the decisions in Ohio, relating to breach of the covenants of a deed, is: 1. That the covenant of warranty is *not* broken till after eviction by title paramount, v. 154; xvii. 66. 2. That any disturbance of the warrantee's possession which is equivalent to eviction—as the assignment of dower, xvii. 66; a recovery in ejectment, though tenant is still in possession, v. 151—is a breach of the warranty. 3. That the covenants of seizin, and power to convey, are REAL, and run with the land, when the covenantor is in possession of the land at the time it is conveyed, xvii. 52; and personal when he is not in possession, xvii. 52. 4. These last-named covenants, when they run with the land, are only broken upon an eviction or its equivalent; but when they are personal, they are broken when made, if grantor has no title, iii. 211; xvii. 52. For a learned summary of the law relating to covenants of deeds, see Mr. Wilcox's note, x. 817, which is also found in his Digest, 167.

There are two pages with the folio 348 in the original edition of this work.
324

COMMISSIONERS OF BROWN COUNTY v. BUTT, LATE SHERIFF.

County liable to sheriff for not providing jail, where sheriff has been subjected to an escape.

Where there is an escape of a debtor, in prison for want of a jail, it is proper to sue the sheriff for an escape.

In a suit by sheriff against the county, for damages sustained in consequence of no jail being provided, record of suit by party injured, against sheriff, admissible evidence.

Commissioners liable for not supplying jail, without reference to degree of negligence.

Special action on the case, proper form of action for sheriff against commissioners to recover damages sustained by escape for want of jail.

THIS was a writ of error to the judgment of the court of common pleas of Brown county, in an action on the case, brought by the defendant in error, against the plaintiff in error, and was adjourned, by the Supreme Court of Brown county, for decision at Columbus.

The case was this: Butt brought a special action on the case, against the commissioners, and charged that one Shaw brought an action against Parker, by *capias*, requiring bail, which was put into Butt's hands, as sheriff, to be executed. That he arrested Parker, and took appearance bail. That in term time, the bail surrendered Parker, who was committed to the custody of the sheriff and escaped, the county having provided no jail. That Shaw prosecuted an action for the escape, against the sheriff, the plaintiff in this action, and recovered, whereby he sustained damages. Plea, not guilty.

At the trial, the plaintiff offered and gave in evidence:

1. The record of the suit, Shaw v. Butt.
2. The order of the court committing Parker to custody.
3. Shaw's receipt to Butt for the amount recovered.
4. Butt's commission as sheriff, with his oath of office.
5. Proof by witnesses that there was no jail in the county when Parker was committed.

To the admission of this testimony, the defendants objected, and their objection being overruled, they took a bill of exceptions.

They then moved the court to instruct the jury, that the plaintiff could only recover nominal damages. This *motion was [349

Com'rs of Brown Co. v. Butt.

overruled, and it was decided that the judgment obtained by Shaw against Butt was *prima facie* evidence of the damage sustained by the plaintiff. To this opinion the defendants also took a bill of exceptions.

The defendants moved the court to instruct the jury, that unless the commissioners were guilty of gross neglect, in omitting to furnish a jail, they were not liable. This motion was also overruled, and the court instructed the jury, that it was the duty of the commissioners to furnish a jail—that if no jail was furnished, the sheriff was nevertheless liable for escapes, and the commissioners liable over to him. To this opinion the defendants also excepted. Verdict for the plaintiff for the amount recovered against him of damages and costs. Judgment on the verdict—general error assigned.

MARSHALL and GILLELAND, for plaintiffs in error, contended :

1. That the county commissioners were not bound to furnish a jail, and therefore could not be liable in this action. They cited *Campbell v. Hampson*, 1 Ohio 119.

2. That the record of the case of *Shaw v. Butt* was inadmissible as evidence—the defendants in this case being neither parties nor privies, in blood or law, to either of the parties in that case. 1 Phillips' Ev. 226, 228.

3. Nominal damages only ought to have been given, because there was no evidence that Shaw had recovered anything against Parker. And the recovery of *Shaw v. Butt* was for a voluntary escape, for which sheriff ought not to recover. 2 Phillips' Ev. 227.

4. Defendants were only liable for gross negligence. Commissioners are by law vested with a discretion to erect a jail, when "they should deem it necessary." Where discretion is given, party is only liable for gross negligence. 1 Johns. Ch. 18.

5. If commissioners are liable, the action should have been brought direct against them by Shaw. This would avoid circuitry of action, and put the original defense in the hands of the party ultimately liable.

6. The action ought to have been in assumpsit, and not in tort.

350] *BRUSH and FITZGERALD, for defendant in error :

Insisted that the case of *Campbell v. Hampson*, 1 Ohio, 119, was against the plaintiff in error. In that case, the court decided that the sheriff was bound to keep the prisoner in the jail fur-

nished by the county, and was not liable if it were not properly constructed.

The record, in the case of *Shaw v. Butt*, was properly received in evidence, and was conclusive as to Butt's liability, and as to the amount.

It is a mistake to suppose that the extent or degree of negligence was the matter to be tried. If the county provided no jail—and they were bound by law to furnish one—the county must be liable, where any individual is injured by that neglect.

It has been settled in this state, by two decisions of the Supreme Court in Pickaway county, that the proper mode of proceeding is for the party injured to sue the sheriff. The sheriff is always liable to the plaintiff for an escape. And the plaintiff ought not to be turned over to a suit against the county, and tort is undoubtedly the proper form of action.

Opinion of the court, by Judge HITCHCOCK:

The first and most important question presented to the court for decision in the present case is, whether a county can be made responsible for the escape of a prisoner, confined for debts where the escape happens in consequence of the want of a jail, or where the jail furnished by the county commissioners is insufficient. It is necessary to dispose of this question in the first place, because if the county is not liable, the judgment of the court of common pleas was erroneous, and must be reversed.

The law has been long settled in England, the country from which we derive most of our laws, as well as our ideas of jurisprudence, that the sheriff is liable for escapes. It is to him, and him alone, in such cases, that the judgment creditor can look for redress. The same principle prevails in some, although not in all, our sister states. Whenever a question of law has been settled in England, the courts in this country are in the habit of adhering to such decision. *It is undoubtedly correct that such [351 should, as a general rule, be the case. But to adhere blindly to English decisions when no good reason can be assigned for them, or when no other reason can be assigned than *that it has been thus decided*, to do this without inquiring what influenced the courts to make such decisions, to do it without inquiring whether the same reasons exist in this country as in that, would be foolish in the extreme. It is a useful maxim that when the reason of a law ceases,

 Com'rs of Brown Co. v. Butt.

the law itself should cease. A particular law, or rule of law, might be very beneficial in England, or one of our sister states, which, if enforced in Ohio, would be attended with injurious consequences. Influenced by these circumstances, this court has ever been in the habit of looking to the effects which would follow the adoption of any particular rule of decision. Why is the sheriff in England made liable for an escape? The reason is obvious. The sheriff in that country, as well as in this, is the keeper of the jail. But he is not bound to confine the debtor in the public jail of the county, if there be one, but he may confine him in a house or prison furnished by himself. If the public prison is insufficient he can make all necessary repairs or alterations, and for the expense will be indemnified. In short, he may adopt any course which is essentially necessary to secure his prisoner, provided he confines him within the proper bailiwick. Such being his situation, it is perfectly proper that if the prisoner escapes, he should be liable. The escape will not happen without a violation or neglect of duty on his part, and whenever an individual sustains an injury in consequence of the violation or neglect of duty on the part of a public officer, justice requires that the officer should make reparation for that injury. But to make the officer liable where no such circumstance intervenes, when he has in fact complied with the requisitions of law and with his own duty, would be manifestly unjust. What, then, is the situation of the sheriff in Ohio? Can he confine the debtor in such place as he thinks proper? Can he confine him in a prison of his own choice? It will not be pretended. On the contrary, the law requires that the debtor shall be confined in the jail of the county. And should he be confined in 352] any other *place, the sheriff would be liable to the creditor for an escape, or to the debtor for false imprisonment. True, the sheriff may, under peculiar circumstances, convey his prisoner to the jail of an adjoining county, but this is only in extraordinary cases. Is the sheriff authorized to fix upon the place for, or to erect a jail for the county? In the "act providing for the erection of public buildings," passed January 22, 1810, the law in force when the escape now complained of happened, but which does not materially vary from the present law on the subject, these duties are assigned to the county commissioners.

The sheriff has no power to provide a prison, nor can he repair one unless at his own expense. Under these circumstances, to

make the sheriff ultimately liable for the escape of a prisoner, when the escape happens for the want of a jail, the law giving him no power to furnish such jail, or to make him liable when the escape happens through the insufficiency of the jail, the law conferring no right upon him to make necessary repairs, would be manifestly unjust. It would be to inflict a penalty on an officer who had violated no law, who had been guilty of no violation or neglect of duty. It would, in fact, be to punish him for a neglect of duty on the part of others.

When the escape is voluntary, or where it happens in consequence of the negligence of the sheriff, he ought to be liable. But where it happens in consequence of circumstances not within his control, the principles of justice require that he should be exonerated.

It may, perhaps, be thought by some that if the sheriff is to be exonerated on the grounds before specified, it would be proper to make the county commissioners liable in their individual capacity. But we must consider the capacity in which the county commissioners act. They are the representatives of the county. The money which they expend is the money of the county. The funds with which public buildings are erected, are the funds of the county. In fact, the acts of the commissioners are the acts of the county, and it is only through them that the business of the county can be transacted. And when it is said that it is the duty of the commissioners to furnish public buildings, nothing more ^{is} [353 intended than that this should be done by the county. It is true the commissioners may, in some cases, be punished criminally for a neglect of duty, but *this* is a civil action, the object of which is to recover remuneration for a civil injury. The injury has been sustained in consequence of a neglect of duty on the part of the commissioners, not as individuals, but in their corporate capacity as the representatives of the county of Brown. If liable at all, therefore, they must be liable in this capacity.

Inasmuch, then, as it is duty of the commissioners of a county, or, in other words, of the county itself, acting by its commissioners, to furnish a good and sufficient jail; and, inasmuch, as the sheriff has no voice nor control in this business, it is the opinion of a majority of the court that where an escape happens in consequence of the want of, or insufficiency of a jail, the county must be eventually liable for such escape. Similar considerations influenced the court in the decision of the case of *Campbell v. Hamp-*

Com'rs of Brown Co. v. Butt.

son, 1 Ohio, 119, and we see no reason to change the principle there decided.

Having disposed of the question which I considered the most important in the case, I will now proceed to consider the other points made by the counsel for the plaintiffs in error. It is urged that admitting the principle settled by the court to be correct, Shaw could not, with propriety, have a recovery against Butt, turning Butt round against the county for his indemnity; but should, in the first instance, have commenced an action in his own name against the county. If this were a new question, I should feel disposed to concur in opinion with the counsel for the plaintiffs in error. It being the duty of the county to furnish a prison, and the escape having happened in consequence of a neglect of this duty, it would seem to be proper that the county should be directly liable to the party injured. By adopting such course, circuity of action would be avoided. The party in fault would suffer for his negligence, while an innocent individual would not be put to the trouble of defending or prosecuting a suit. But I do not consider this question as open for discussion. It has been repeatedly decided that the judgment creditor must look to the 354] sheriff *for his remedy, and in this case we settle the principle that the sheriff shall be indemnified by the county. The decision of the court of common pleas was, therefore, in this particular correct.

It is further objected that the court of common pleas permitted the record, in the case of Shaw v. Butt, to be given in evidence to the jury—the plaintiffs in error not being either parties or privies to the judgment in that case. The principle contended for is, as a general rule, undoubtedly correct. Had the action been founded upon that judgment, the record should have been excluded—such action could not have been sustained. But the foundation of the action was the negligence of the commissioners in furnishing a jail, in consequence of which the plaintiff below had sustained an injury. The extent of this injury must be ascertained, and this could be done only by showing the amount he had been compelled to pay. For this purpose the record was introduced. It was mere collateral matter, and for this purpose might well be given in evidence.

The next exception is that there was no evidence that Shaw proved that he sustained any damage in consequence of the escape

of Parker, and, therefore, that the damages in the case of Butt against the commissioners should have been merely nominal. And, moreover, that the recovery against Butt was for a voluntary escape. It is the opinion of the court that the amount of damages recovered by Shaw v. Butt is the proper rule of damages in the present case. Whether the evidence submitted to the jury was sufficient, in that case, to justify them in finding that amount of damages, we know not. The reasonable presumption is that it was. Nothing to the contrary appears, nor can the correctness of that verdict be questioned in this case. As to the nature of the escape, whatever might have been the form of action against Butt—whatever might have been the evidence in the case against him—it appears from the bill of exceptions before us, that the escape happened in consequence of the want of a jail. Had a sufficient jail been furnished, the county must have been exonerated. The sheriff alone would have been liable. But such was not the fact.

*It is further objected that the court of common pleas refused [355 to instruct the jury, that unless they believed the commissioners had been guilty of gross negligence, they must find for the defendant. Such instruction would have been improper. Should the commissioners of a county be indicted for not erecting public buildings, under section 14 of the "act establishing boards of commissioners," it might be a good defense for them to show that they had not been guilty of gross negligence. But such defense can not be allowed in a case like the present. Here, an individual has sustained an injury in consequence of the neglect of the commissioners. The injury to him is the same, whether the negligence was gross or otherwise, and he is equally entitled to redress.

An objection is made to the form of action. It is said it should have been *assumpsit*. But this objection will not avail. The action is a special action on the case, and well brought.

In whatever point of view I can consider the case, it appears to me that the court of common pleas were correct in the determination of the several questions submitted to them, and in this opinion a majority of the court concur.

The judgment of the court of common pleas is therefore affirmed, at the cost of the plaintiffs in error.

Judge BURNET's dissenting opinion:

The ground on which I dissent from the opinion of the court in this case is, that I can not consider a county, in its corporate capacity, as liable for the illegal conduct of its officers; and if it is not so liable, I do not perceive any ground on which this action can be sustained. There is no statute in this state, by which it is made responsible, and if there be any principle of common law that can sustain the suit, it has escaped my observation. There is not any contract, either express or implied, subsisting between the plaintiff and the county of Brown, on which the claim can be founded, nor has the county, in its corporate capacity, been guilty of a tort to his prejudice. If the commissioners, by a willful omission of duty, have caused him an injury, they may be answerable for the consequences, *in an action properly framed for that purpose. The statute made it the duty of the commissioners to provide a sufficient jail, and gave them the means of doing so. They voluntarily accepted the trust, and if they have neglected to execute it, and by that negligence the plaintiff has been injured, the injury has not proceeded from the county, but has been occasioned by the illegal conduct of the commissioners. for which they are personally responsible.

Reference has been had to considerations of policy. If there be any weight in these arguments, they are better calculated for the legislative hall than for a court of justice. They might influence the legislature to provide a remedy, but they do not show that it already exists. It may, however, be fairly questioned whether good policy requires such a recourse. A county can not provide public buildings, in any other way than by the agency of its officers. If those officers may neglect their duty with impunity, as will be the case if they can transfer the consequences of their negligence to the county, a strong inducement to the faithful and punctual discharge of duty is lost. It will be a matter of but little moment, as it regards them personally, whether they provide a sufficient jail or not, if the consequence of their negligence is to operate on the public treasury, instead of their own purses. If considerations of policy can be properly used in a case like this, I incline to the opinion that it is better to let the officers bear the consequences of their omissions of duty than invite them to such omissions, by providing an indemnity, or by suffering them to offend with impunity. It can not be good policy to remove incen-

tives to duty. If it be said that cases of hardship may arise, in which the commissioners are not chargeable with inexcusable neglect, so as to be personally liable it may be replied, that in such cases the sheriff, or other person injured by an escape, may petition for relief, with a fair prospect of success, if his claim be a meritorious one. But it does not follow that a legal right of recovery must exist for every loss attended with hardship. There are cases without number in which such losses are sustained, and the sufferers are destitute of a remedy, because there is no person legally bound to indemnify. It can not be overlooked, *how- [357
ever, that in the case before us, all the parties acted voluntarily and advisedly. The sheriff knew the situation of the public buildings when he accepted his office, and the defendant had the same knowledge when he caused his debtor to be imprisoned. The hardship, therefore, is not as good as it would seem at first view.

If the liability contended for really existed, it is a natural inference that some adjudged cases might be found to support it, but the research of counsel has not enabled them to produce a solitary case, in which the funds of the county, or corporation, have been rendered liable for injuries sustained by the unauthorized, illegal, and tortious acts of its officers. As far as the case of *Campbell v. Hampson* applies, I consider it an authority against the plaintiff. That case was decided on the principle, that a sheriff, who was expressly commanded by the statute to commit a person in his custody to the common jail, and to a particular apartment in that jail, could not be charged as a *trespasser* in discharging that duty, because, by the misfeasance of the commissioners, the apartment in which he was directed to confine the person had not been provided; by which it was impossible for him to perform the duty in the precise manner directed.

And in delivering the opinion, the court do distinctly intimate, that the party injured had a remedy against the commissioners, whose duty it was to have provided a separate room for debtors. If anything can be inferred from that case, applicable to this, it is that this plaintiff was not liable for an escape which he could not prevent, etc., that he might have defended himself against the suit of the creditor, and turned him over to the commissioners, who were exclusively liable for the injury he had sustained. And again, I do not see how a decision that the sheriff is not liable to an action of *trespass*, in a particular case, and that he may defend

Com'rs of Brown Co. v. Butt.

himself against it, can be improved as an authority to show that in a case of a different character, he may submit to a judgment, and then compel an indemnity from the county.

The books abound in cases, both English and American, in which recoveries have been had against sheriffs for escapes, but 358] not an instance can be found in which they *have recovered an indemnity against the county. If it be replied that this is because the sheriffs in England are not bound to confine debtors in the public jail, but may, at their election, provide a private jail, or may repair the old one, if necessary, for which they are to be remunerated; the same reply may be given, with equal force, in the present case. In Ohio, the county commissioners are authorized and directed to provide sufficient jails, and it is their duty to levy and collect money, or to contract debts for that purpose if necessary. Consequently, they stand in the situation of sheriffs in England, in relation to escapes, and ought to be answerable for the insufficiency of the jail, in the same manner, and to the same extent. They, as well as the sheriff, are county officers, and in providing public buildings, they all act as agents of the county.

If an escape happens in England, through the insufficiency of the jail, the sheriff must answer for it, and he has no recourse on the county. For the same reason, the commissioners in Ohio should be answerable without recourse. It is a just maxim, that "the reason of the law is the life of the law." The sheriff, in the case put, is liable without recourse on the county. Why? Because he has been guilty of a misfeasance, in not providing a *sufficient* jail. Therefore, and for the same reason, the commissioners should be liable without recourse, they having been guilty of a nonfeasance, in not *providing* a jail.

In every instance, within my knowledge, in which a county has been held liable for an escape, it has been made so by statute. It is by statute, the hundred in England, is made liable for robberies, in certain cases, and under our territorial government, a statute was adopted by the governor and judges, in August, 1792, declaring the counties liable for escapes that should happen through the insufficiency of the jail. The act pointed out the manner in which the money should be assessed and paid, and also the mode of commencing and conducting suits for the recovery thereof, in case the courts should not order it assessed and paid. The frauds that were practiced on the counties, under that law, by collusions be-

tween plaintiffs and defendants, when no debts were really due, and when defendants were utterly *insolvent, became so [359] apparent and oppressive, that the first territorial legislature, in 1799, repealed the act, and no subsequent legislature has seen proper to revive it.

Prior to the adoption of that law, I believe no attempt was made to charge a county in such a case, and this is the first suit that has been brought for that purpose, within my knowledge, since the repeal of the law, although escapes have been numerous, for which the sheriffs have been held answerable to the persons injured. The natural inference is, that it has been the prevailing opinion that such actions could not be sustained at common law.

From the most careful view I have been able to take of this case, it appears to me that the county of Brown is not liable, either by statute, or by contract, to pay the money demanded, nor do I discern that she has committed any tort to the injury of the plaintiffs, and I do not know of any ground, distinct from these on which the action can be sustained.

The duty and the power of the commissioners is created by statute. While they act within the scope of their powers, the county must be bound, but if they should make a contract, to remove the seat of justice, or should seize on private property, for county purposes, contrary to law, the county would not be bound by the contract, or liable for the trespass; they would be responsible in their private capacities. The proposition, therefore, that "the act of the commissioners is the act of the county," must be taken in a restricted sense. It would be mischievous, as well as unprecedented, to hold the county answerable for their tortious and illegal proceedings.†

†NOTE BY THE EDITOR.—As to record evidence, see *Gibbs v. Fulton*, ii. 180, and note. The law of this case is recognized, vi. 13, and same principle, i. 119.

360] *EBENEZER BUCKINGHAM & Co. v. GRANVILLE ALEXANDRIA SOCIETY.

Upon motion for an order to sheriff to make a deed, court only look to the execution on which the sale was made, and proceedings under it.

THIS was a motion for an order to the sheriff to make a deed for lands sold on a *fi. fa.* It was certified to the Supreme Court of Licking county, from the court of common pleas of that county, for the want of a constitutional quorum of disinterested judges to decide it, and was reserved for decision at Columbus. The facts were these:

At the October term, 1820, of the common pleas, the plaintiffs recovered judgment against the defendants for \$3,752.62. Upon this judgment a *fi. fa.* issued in April, 1821, and among other property was levied on south half quarter 3, township 4, range 13, and on another tract of twenty-two and a half acres, on which the Granville furnace was erected. These lands were mortgaged to the bank which was defendant, and the levy was made in conformity with the provisions of the act of February 2, 1821, providing for the collection of debts due from banks and bankers. The amount of debt due upon the mortgages and the value of the property were found and appraised according to law, and the sheriff returned that the lands were not sold for want of buyers.

At the September term, 1822, on the motion of the plaintiffs in execution, the levy and appraisements were set aside by the court. At the next succeeding term, May, 1823, the plaintiffs moved the court to rescind the order of the previous term, setting aside the levy and appraisal. This motion was continued for decision, and at the December term, 1823, an order was made rescinding the previous order, and restoring the parties to all the rights they had secured previous to the order of September term, 1822. At August term, 1824, the appraisal made upon the first *fi. fa.* was set aside, a new appraisal directed, and leave given to the plaintiffs to release so much of the levy as they might choose. A new appraisal was had, and the property bid off at two-thirds of that appraisal, upon which this application for the order directing a deed was made.

*EWING, for plaintiff.

[361

IRWIN, for defendants.

Judge SHERMAN did not sit, having been counsel in the cause.

Opinion of the court, by Judge HITCHCOCK

This motion was originally made in the court of common pleas of Licking county; and there not being a quorum of disinterested judges in that court to determine the question, it has been certified to this court for decision, according to the provisions of section 68 of the practice act. 22 State Laws, 64.

It is necessary in this case, as in every other, to inquire what is the matter in controversy—what is the question to be decided? The application is for an order upon the sheriff, to make a deed to the purchaser of certain lands, by him sold on execution, at the suit of the plaintiff against the defendants. The case must be considered in the same light as if the execution had been issued from this court. In such case we should not have gone back to inquire whether the judgment upon which the execution had issued was erroneous, or whether an improper order had been made for issuing the execution. If the execution had been improvidently issued the party injured thereby would not be without redress. The proper course for him to pursue would be to move to have the execution, or the proceedings under it set aside. Upon such motion the court might, with propriety, travel back and inquire whether, subsequent to judgment, there had been anything irregular in their own proceedings, or in the conduct or proceedings of their officers.

Counsel for defendants, in argument, treat the question as if it arose upon a motion to set aside the execution and proceedings, or as if the proceedings had been removed from the court of common pleas to this court, by *certiorari*, for irregularity. In this they mistake the point in issue. Admitting that there was so much irregularity in the proceedings that the court would, upon a proper application, set them aside, still it does not follow that the [362 motion now under consideration must be overruled. We certainly are not acting as a court of errors to review the proceedings of the court of common pleas. We are in effect acting as a court of common pleas. That court not being competent, in consequence

Buckingham & Co. v. Granville Alexandria Society.

of an interest in some of its members, to decide the motion submitted to them, the duty of making the decision is, by virtue of the statute, transferred to us.

Upon a motion to set aside an execution, as has been before observed, the court can, with propriety, examine the previous proceedings to ascertain whether there has been any irregularity in the orders of the court or in the proceedings of the clerk; but upon a motion similar to the present I apprehend we can look no further than to ascertain whether the officer, in making the sale, has pursued the law. I infer this from the nature of the application and from the words of the statute. These words are as follows: "*Provided*, that if the court to which any execution shall be returned by the officer, for the satisfaction of which any lands and tenements may have been sold, shall, *after having carefully examined the proceedings of said officer*, be satisfied that this sale has been made in all respects in conformity to the provisions of the act, they shall direct their clerk to make an entry in the journal, that the court are satisfied of the legality of such sale, and an order that the said officers make to the purchaser a deed for such lands and tenements."

Let us inquire, then, whether the sheriff, in making the sale, complied with the requisitions of the law. From the documents before us it is manifest that he caused the lands to be appraised "*by five respectable disinterested freeholders*" of the county; that these freeholders were by him duly sworn before they made the appraisement; that the said appraisers made a return to him of their appraisement, "*under their hands and seals*;" that he forthwith thereafter deposited a copy of the return" with the clerk of the court from which the writ issued;" and that the property was sold for two-thirds of the appraised value. It is further manifest that he gave public notice of the time and place of sale, for more than thirty days before the day of sale, by advertisement in a public 363] newspaper, printed in the *county of Licking, the county in which the land lies, and that the sale took place at the courthouse of said county.

I am at a loss to discover in what particular the officer has failed in his duty. In fact, the complaint is not so much with respect to the officer, as to the court. Upon the whole, "*after having carefully examined the proceedings*" of the officer, I am "*satisfied that the sale has, in all respects, been made in conformity to the*"

Buckingham & Co. v. Granville Alexandria Society.

provisions" of the statute, and that the order must be made according to the request of the plaintiff. Let it be made accordingly.

Dissenting opinion of Judge BURNET :

Having dissented from the opinion of the court in this case, it becomes my duty to assign the reasons which have induced me to do so. The cause having been certified to the Supreme Court for the want of a constitutional quorum of disinterested judges to hear and determine it, in the court below, it necessarily comes before us as it stood before them, and it is our duty to examine the proceedings as though they had all taken place in this court, for the purpose of ascertaining whether they have been such as to entitle the applicant to the benefit of his motion.

I am so unfortunate as to differ from my brother judges, who have taken a part in the decision of this case, at the very threshold, as to the extent of the ground we are authorized, or required to occupy. They draw a very marked distinction between this investigation, and that which would be proper on a motion to set aside an execution. I confess that I do not discover any difference in the latitude of inquiry that is admissible or necessary in the two cases. I do not contend that the court can go behind the judgment in either case, but I do contend that the object of this procedure can not be attained without a thorough investigation of all the proceedings subsequent to the judgment, that are connected with the execution and sale, whether they emanate from the sheriff, the clerk, or the court. If, on application like the present, it should appear that there had been no judgment, or execution, or levy, or that the officer had proceeded to sell after the court had set aside the execution, or if it should appear *that [364 the levy and appraisement had been set aside before the sale, as was the fact in this case, would we be justified in shutting our eyes upon these discoveries, and blindly ordering a deed to be made to the purchaser? I am constrained to answer in the negative. This answer would be forced upon me, by the strict letter of the statute, were I at liberty to overlook the spirit and design of it. In conducting this inquiry, the statute requires three things :

1. The court must examine the proceedings of the sheriff, to ascertain if they have been regular.

Buckingham & Co. v. Granville Alexandria Society.

2. They must be satisfied that the sale has, *in all respects*, been made in conformity with the provisions of the act.

3. They must be satisfied of *the legality of the sale*.

If, on the first branch of the inquiry, the proceedings of the sheriff should appear regular as to the levy, appraisement, return, advertisement, and mode of sale, it would not necessarily follow that the sale had, in all respects, been made in conformity to the statute. Other parts of the statute might have been violated. When we speak of the legality of a sheriff's sale, we understand that all the proceedings connected with it, from the issuing of the execution, to the striking off of the land, has been regular. To confine the import of that term to its literal signification, which is the simple act of crying off the premises, would be a narrow interpretation, indeed. The maxim *qui heret in litera, heret in cortice*, would well apply. Although the acts of the sheriff, in themselves considered, might be unexceptional, yet if it should appear that the execution on which he acted, had been issued by justice of the peace, or that there had been no levy, or that the levy and appraisement had been regularly set aside before the sale, it could not be said, that the sale had, in all respects, been made in conformity with the act, nor would the court be satisfied with the legality of the sale, because such circumstances would render the sale a perfect nullity, and clearly show that the purchaser was not entitled to a deed. Such facts as would avoid a deed after it was made, ought to be sufficient to withhold an order for making it; but on the limited construction which has been given to the statute, the provisions which are most essential to the legality and 365] validity of the *sale must be disregarded. The act requires an execution founded on a judgment of a court having jurisdiction of the subject matter, on which there must be a levy and an appraisement. These are provisions of the act, and if they have not been performed, the court can not see that the sale has, in all respects, been made in conformity with them. If the statute provides that there shall be a levy and an appraisement before a sale, and the sale be made without a levy, it appears as plain as an axiom, that the sale is not made *in all respects* in conformity with the provisions of the statute, because a levy is one of those provisions. If such matters as these are not to be regarded, this investigation must be a useless sacrifice of time. The form might be dispensed with, and the deed executed at once. From this

Buckingham & Co. v. Granville Alexandria Society.

view of the subject, I feel it my duty to examine the objections to the levy, including the orders of court in relation to it, as well as the objection to the appraisement and sale.

The defendant objects:

1. Because the statute under which the levy was made (1821) had been repealed before the issuing of the *vend. expo.* on which the sale was made.

2. Because the levy on which the sale was made, had been set aside by the court, on motion, and at a subsequent term had been reinstated.

3. Because the lands had not been separately appraised, as the statute directs.

4. Because the sheriff rejected a part of the land levied on and embraced in the mortgage, and refused either to value, or sell it, on an allegation that the title of the mortgagor was defective.

It appears from the record that the plaintiff obtained judgment against the Granville Banking Company, and proceeded to levy an execution on sundry tracts of land, mortgaged to the bank, by three separate deeds. The levy was made in April, 1821, under the act of 1820, which was repealed by the act of 1822; the act of 1822 was repealed by the act of 1824, under which the sale was made.

In September, 1822, the court of common pleas set aside the whole levy, on motion of plaintiff, the premises having *been [366 twice offered for sale. At the December term, 1823, the court, on motion, rescinded the order of September, 1822, and directed the levy of April, 1821, to be reinstated. In the interval, a number of executions were issued on judgments at the suit of other creditors, and levied on the same property, by which those creditors claimed the preference. The different tracts contained in the mortgages were not separately appraised, and a part of the mortgaged property was relinquished by the sheriff, on the ground that the title of the mortgagor was defective. These are the most important facts relating to the points that are to be considered.

1. I agree with the majority of the court, that the first objection can not be sustained, because the repeal of the law under which the levy was made, did not affect the execution previously issued, or the levy that had been made on it. The proceedings, as far as they had gone, were valid. The levy was as operative after the repeal as before it. The new law affected only those proceedings

Buckingham & Co. v. Granville Alexandria Society.

that took place after it came into force. The principle assumed by the defendant, would be inconvenient and mischievous in its consequences.

The act regulating judgments and executions has been frequently changed, and if the repeal of one law, by the substitution of another, should render void the steps that had been previously taken, it would be difficult for judgment creditors to recover their money, as every revision and repeal would make it necessary to commence *de novo*, so that it would be impossible to calculate when their labors would come to an end. And it may be remarked that the last statute refers to judgments, executions, and levies previously made, and, by a fair construction, recognizes them as valid.

It has been decided in this court, in several analogous cases, under the practice act, and under the act in question, that such a change as has taken place in this instance does not affect proceedings which have been had, or rights which have been acquired prior to the change, unless it be expressly so directed. It was not necessary for the plaintiff to obtain a new writ and a second levy. *Vide G. Arnold v. Fuller's heirs*, 1 Ohio, 458. The authorities [367] cited by defendant's counsel, in support of this objection, do not sustain it. *Milner's case*, cited from 3 Burr. 1456, and 1 Black. 451, is not applicable. That was a special jurisdiction, given to the justice, by a statute which had been repealed "to all intents and purposes whatsoever," without providing any substitute. All jurisdiction on the subject had been taken away in express and strong terms, and the question was not whether the steps that had been taken were regular, but whether the justices were authorized to proceed any further in any form. The same remark applies to the case of *Hollingsworth v. Virginia*, 3 Dall. 378. That was also a question of jurisdiction. By an amendment to the constitution, the jurisdiction of the court had been entirely taken away, and they were necessarily compelled to stay further proceedings. But such was not the fact in this case; the subject matter in question was, and continued to be, within the jurisdiction of the court, and the change in the law operated only on the proceedings that should subsequently take place.

The execution and levy had been regularly and legally conducted, and as the whole process of execution is one entire act, the pro-

Buckingham & Co. v. Granville Alexandria Society.

ceedings after the levy relate back, and take their effect from the date of the levy.

Passmore's case, from 4 Dallas, was an indictment for perjury, founded on the bankrupt laws of the United States. It was pending when the law was repealed. The court determined that the case was not within the saving clause, and the defendant had a verdict. Duane's case, from 1 Binney, was an indictment for a libel against a public officer. Pending the prosecution the legislature of Pennsylvania passed a law, declaring that from and after the passage of that act, no person should be liable to prosecution by indictment for the publication of such papers as the one complained of. The court divided in opinion. The majority, however, decided that the act put an end to the prosecution. But there can not be any analogy between these cases and the one before us.

They were on penal statutes, which are not construed by the same rules, nor with the same latitude of discretion as remedial statutes.

*2. The second objection leads to an examination of the [368 power of the court of common pleas over their own orders and proceedings, and of the effect of their rescinding order of December, 1823. They had an undoubted right to set aside the levy, and when that was done, the parties in interest were placed on the ground on which they would have stood if the levy had never been made. It appears from the record that the order setting aside the levy was made in September, 1822, and that Buckingham permitted that order to stand till December, 1823, a period of fifteen months, during which time other judgment creditors, availing themselves of the right secured by statute, sued out executions, and caused them to be levied on the same property, by which they claim a lien, to the exclusion of the plaintiff. Section 17 of the act regulating judgments and executions provides that no judgment, heretofore rendered, or which may thereafter be rendered, on which execution shall not have been taken out and levied before the expiration of one year, next after the rendition of such judgment, shall operate as a lien on the estate of any debtor, to the prejudice of any other *bona fide* judgment creditor.

From September, 1822, to December, 1823, Buckingham had no levy on the property in question. His levy having been set aside on his own motion, he stood, as to other judgment creditors, as though no levy had ever been made, and a new execution and levy

Buckingham & Co. v. Granville Alexandria Society.

became necessary; but if it could be admitted that the court had power at the December term, to revoke an order which had long before become matter of record, and to reinstate the levy on the old execution, it must, as to third persons, operate as a levy from that term, and consequently the plaintiff will have lost his preference, because much more than twelve months had elapsed, and other judgments had been levied upon the same property. It is impossible for the order in December, 1823, to relate back, so as to divest rights legally vested before it was made. Such an operation would defeat the intention of the statute.

It appears to me that this question may be brought within a narrow compass.

369] *Had Buckingham a levy on these lands when the junior judgments were levied?

He certainly had not, as appears from the record, and as his judgment at that time was of more than three years' standing, he had lost his preference, by section 17 of the statute of 1824, and it was not in the power of the court to restore it, so that, whether the court had or had not power to pass the rescinding order, does not change the effect, for, admitting they had the power, it could not operate retrospectively. The plaintiff's rights must stand as if his levy had been made at the time of the rescinding order. This principle was fully settled by this court, in the case of *Patten v. Hedges*, at the present term. It was decided in that case, that after Patten had set aside his levy, he stood, as to all subsequent proceedings, as though no levy had been made, and that the property could not afterward be sold *till it was again seized in execution*. It was also decided that by setting aside his levy, after the expiration of twelve months from the date of his judgment, he lost his preference by section 17 of the act of 1824, although he had the first judgment, and had made his first levy within the term of twelve months.

3. The third objection renders it necessary to look into the statute subjecting mortgaged premises to execution on judgments against banks and bankers. Section 14 makes it the duty of the officers to ascertain and report to the court the amount due on the mortgage. Section 15 provides, that when lands are mortgaged to secure a sum greater than the value thereof, the interest of the mortgagee shall not be sold for less than two-thirds of the appraised value; and when mortgaged for a sum not exceeding the value

thereof, the same shall not be sold for less than two-thirds of the sum due on such mortgage. Section 16 directs, that when more than one tract is included in the mortgage, the amount due on the mortgage shall be ascertained, *and each tract shall be appraised separately*, and if the appraised value of the land shall exceed the sum due on the mortgage, it is made the duty of the sheriff *to apportion the amount due on the mortgage among the several tracts of land, in just proportion to their appraised value*, and to sell [370 each tract of land contained in the mortgage, for not less than two-thirds of the amount apportioned to the same, *liable to be redeemed by the mortgagor*, by payment of the amount apportioned to the same. Section 17 requires all lands held by a bank, in fee simple, or in trust, to be valued and sold as in other cases of execution.

It appears from the record, that a large number of tracts of land was levied on, and that these tracts were contained in three separate mortgages, in which different persons were concerned as mortgagors; it was, therefore, the duty of the officer to ascertain the amount due on each mortgage separately, and to make separate appraisements of the several tracts embraced in each mortgage, and in all respects to proceed in the apportionment and sale, under section 16, as though the mortgaged premises had been taken on separate executions, against different defendants, because, it might be, that the money due on one mortgage was more than the value of the land, and the money due on another was less, in which case, each tract contained in the former would be sold for two-thirds of its value, while each tract contained in the latter would be sold for two-thirds of its proportion of the mortgage money, apportioned as above. This course must be pursued where the parties to each mortgage are the same, and the necessity for observing it is much more apparent where they are different. If it is not attended to, lands may be offered and sold at two-thirds of their valuation, when the law directs that they be offered and sold at not less than two-thirds of the money due on the mortgage. The officer was not at liberty to proceed as though the lands had been all embraced in one mortgage. By pursuing this course, he has subjected them all to be sold at two-thirds of the valuation, and it was impossible for the court to decide on his report, whether or not some portion of them ought not to have been sold under that provision, which gives the mortgagor a right of redemption on the terms prescribed.

Buckingham & Co. v. Granville Alexandria Society.

The proceedings of the officer, in relation to the valuation appear to be defective and irregular in another particular. He has not 371] reported the appraisement of all the *land, although the statute makes it his duty to cause each tract contained in the mortgage to be appraised, and gives him no discretion on that subject. The report was imperfect in this respect, and it was impossible for the court to decide under which branch of section 16 the lands ought to have been sold, admitting that it was correct to treat the three mortgages as one.

4. The fourth and last objection that I shall notice is, the conduct of the sheriff in releasing a part of the mortgaged premises from the execution. One of the mortgages contained one thousand seven hundred and fifty acres, of which about one thousand one hundred acres were valued and sold—the residue having been given up by the sheriff, on the ground that the title of the mortgagor was defective. The objection to the title seems to have been made by the plaintiff, and decided by the officer on his own authority. This step was in direct opposition to the statute, which requires each and every tract to be appraised and sold. It contains no provision for rejecting or omitting any portion of the premises, much less does it authorize an officer to decide on the validity of the title, at the instance of the plaintiff. Questions of title involve matter of fact and of law, which the sheriff is not supposed to be capable of deciding, and the statute, as we should naturally expect, gives him no such authority. Such an examination of title must necessarily be *ex parte*. The sheriff can hear but one side, and of course there would be but a slender prospect of a correct result if he were, in other respects, competent to decide the question. Such a practice would be fraught with mischief. Judgment creditors might select favorite tracts to the exclusion of others less desirable, and by reducing the reported value of the mortgaged premises below the amount due on the mortgage, might subject them to a sale without the statutory right of redemption. These consequences are serious, and show the impolicy and danger, as well as the illegality of the practice resorted to in this case. It may happen that the title to a part, or the whole of the land contained in a mortgage, is objectionable. The judgment creditor may be embarrassed by that circumstance, but this does not authorize 372] *him to select his own mode of getting over the difficulty—he is not at liberty to decide the matter himself, or to have it

 Heirs of Ludlow v. Kidd's Heirs and others.

decided in a summary way by the sheriff. The rights of other persons are involved, and must be respected, however inconvenient the consequences may be to the plaintiff. In ordinary cases, the creditor may select for himself; but in this case, he is pursuing an extraordinary remedy, given by statute, and it is necessary to follow it without any material variation. The plan devised by the legislature will be deranged, and some of the most material principles contained in it must be lost, if the valuation does not embrace every tract contained in the mortgage.

On these grounds, it appears to me that the proceedings on the execution have been irregular—that the sale was manifestly illegal, and that the order applied for ought not to be granted.†

 HEIRS OF LUDLOW v. KIDD'S HEIRS AND OTHERS.

In bill of review, the original bill, answers, exhibits, and depositions are open for examination where the decree contains no statement of the facts found or principles decided.

Persons interested in the subject, though not parties to the original bill, made parties to the bill of review; and where decree is reversed, the bill of review, as to new parties, retained as a supplemental bill.

THIS was a bill of review, adjourned for decision here, from the Supreme Court of Hamilton county.

The case was this: Israel Ludlow died in Hamilton county in the year 1804, leaving four infant children, and a large real estate. Among this was the lot No. 401, in Cincinnati, the legal title to which had been obtained by John Kidd and Joel Williams. To obtain the conveyance for this lot, the infants prosecuted a bill, by their next friend, against Kidd and Williams. The case was strongly litigated, and a mass of exhibits and depositions introduced into the cause. In 1817, the Supreme Court pronounced a general decree of dismissal, containing no recital of the facts con-

†NOTE BY THE EDITOR.—Sheriff's deeds, see note to Walsh v. Ringer, ii. 327.

Heirs of Ludlow v. Kidd's Heirs and others.

sidered as proved, or of the principles of law upon which the dismissal was grounded.

After this dismissal, the lot was disposed of, in different modes, 373] by Kidd and Williams, and had passed, in separate *parts, into different hands. Kidd and Williams having both deceased, and the heirs of Ludlow attained their lawful age, they prosecuted this bill of review to procure a reversal of the decree pronounced against them, and obtain the original object of their bill.

In this bill of review they recited the substance of the original bill and answers, of the exhibits and depositions, and set forth the decree of dismissal. They made the heirs of Williams, the devisees of Kidd, and the persons now holding the legal title, defendants, charging them with notice.

The bill prayed a review and reversal of the decree against the complainants, and a decree for the legal title against those holding it. To this bill the defendants put in a general demurrer, upon which they maintained:

1. That in a bill of review nothing could be looked into but the decree itself.
2. That upon the case made the decree was correct.

The case was elaborately argued by Hammond and Storer for complainants, and by Fox and N. Wright for respondents. But as the decision upon the first point only is to be reported, it is only necessary to state so much of the case, and insert such part of the arguments as are necessary to understand that point alone:

N. WRIGHT, in support of the demurrer:

On a bill of review for errors in law, the court can not inquire into the sufficiency of the proof of any fact; but the original decision of the court upon the effect of the evidence to any disputed fact, must be now taken as conclusive and binding.

It is a principle familiar to every one, that a bill of review can be brought only for errors in law, or for newly discovered testimony. 2 Johns. Ch. 491; 2 Munf. 309; 16 Ves. 348, 350, 398; 17 Ves. 173; 3 Johns. Ch. 126; 4 Hen. & M. 242; 2 Ball & B. 146; 1 Har. Ch. 141, 142, 452; 1 Vern. 166, 292; 2 Eq. Cas. Abr. 173, 177, 1, 81; Coop. Eq. 89.

The two classes of cases are entirely distinct, and so treated in 374] all the books. And the same rule is distinctly *recognized in the statute of this state of February 19, 1810, regulating pro-

ceedings in chancery in force when the original proceedings were had. 14 Rev. Stat. 184, sec. 63.

The distinction between an error in law and an error in fact (or rather a mistake of fact) is perfectly obvious. If, from the evidence adduced, the court are of opinion that a particular fact exists, when in reality that fact does not exist, it is an error in fact; and for such an error no bill of review will lie unless upon newly discovered testimony. The only remedy for such an error is a rehearing, and a different rule would utterly destroy the distinction between review and rehearing.

It is a universal principle of all jurisprudence, that all facts once decided, shall not be again inquired into, unless in the special manner pointed out by law. All testimony is fallible and perishable; to allow parties, after a lapse of time, and the casualties to which all testimony is subject, to have a reinvestigation of a fact once proved and settled, is dangerous in the extreme. It opens a door for imposition, for taking advantage of the death of witnesses, the loss or destruction of papers, and the fickleness or dishonesty of witnesses.

The rules of new trials at law are strongly analogous. There the only method of re-examining facts is by an immediate application to the court; if the facts are preserved by means of a bill of exceptions, the law arising upon them may be re-examined; but there is no proceeding known by which those facts can be disputed on the record.

So in chancery the same distinctions are preserved; the law arising on the facts is a matter of review. But is it not absurd to ask this court again to weigh a volume of testimony, and reconsider whether they have rightly estimated its importance? Even the opinion of a jury, once given, is treated as conclusive; and are the court more fallible than a jury?

In *Combes and Proud*, it is said, "that although the facts on which the court gave judgment were mistaken, yet there is no ground for a bill of review, after a decree enrolled, but the facts must be admitted true." 2 Free. 182; cited 2 Eq. Cas. Abr. 174.

*It is said to be an early and uniform rule in chancery, [375 "that no bill of review shall be admitted, unless it contain either error in law, appearing in the body of the decree, *without further examination of the matters of fact*, or some new matter arising after

Heirs of Ludlow v. Kidd's Heirs and others.

the decree, and not any new proof, which might have been used when the decree was made." Coop. Eq. 89; 3 Atk. 26.

Chancellor Kent repeats the same doctrine. 2 Johns. Ch. 491; 3 Johns. Ch. 126.

And it is recognized in all the cases first above cited, and a host of others to which reference may be made. Indeed, it is a most obvious dictate of common sense. The bill professes to be founded upon errors of law, not of fact. The object of writs of error and bills of review is to render legal decisions uniform, to provide that the law shall not be differently administered by different tribunals, but shall be a certain and settled rule; not to inquire whether a witness is perjured, or whether this man or that is entitled to the greater credit. Apply the above rule to the present case. The error assigned is, that the decree should have been for the complainants instead of the defendants. To this error they are confined, for no error can be examined but what is assigned in the bill. Coop. Eq. 95; 1 Har. Ch. 140; 2 Eq. Cas. Abr. 175. What are the facts in the case, from which the law would be in favor of the complainants? It is not stated in the proceedings what facts are taken by the court as proven; and here we might stop, there being no facts stated, showing on the record an erroneous deduction of law from facts, there is no error appears; and the complainants stand in the situation of a party who complains of an illegal decision of court upon certain testimony, but has failed to make that testimony part of the record, by bill of exceptions.

The rules laid down in the books appear to support this position.

But the chancery act, before referred to, provides for recording the statement of facts, and the testimony taken down by order of court, and may, perhaps, extend to embrace all the testimony taken in the case, making it a part of the record; and I am will-
376] ing to consider the depositions *recited in the bill as a proper subject of examination. The practice which has prevailed under our statute, has been not to set forth the facts which are ascertained from the evidence as the foundation of the decree, but to leave them to be inferred from the recorded testimony. Viewing the case in this manner, and applying the same principle, what must be the result? The court (and so is the distinct language of the statute) can review only *errors of law*, in a case like the present. They *can not*, they *have not the power* to review matters

Heirs of Ludlow v. Kidd's Heirs and others.

of fact, or to reverse the decree, because they have erred in finding a particular fact from the evidence. They are confined to the law arising upon the evidence. They must, therefore, look into the depositions in the same manner that they would in any other case, if called upon to decide the law arising upon evidence; in other words, precisely as on a demurrer to evidence at law. The complainants say, that on this evidence there could not by law be a decree against them. This is strictly a demurrer to evidence, and the rules in that case are clearly applicable.

"A demurrer to evidence must admit the truth of all facts which the jury *might find* in favor of the other party, upon the evidence laid before them." 1 Phil. Ev. 216.

And this extends to every inference which the jury might fairly have drawn from the evidence. To every presumption which, on a reasonable construction, could arise from it. 4 Cran. 219; 1 Johns. 241; 5 Id. 29; 3 Bin. 457; 2 Wash. 203.

So, in the case now before the court, in deciding whether a decree, not erroneous in law, could be made upon the evidence, every fact fairly inferable from the evidence must be admitted. There is no other possible manner of considering the case without reviewing as well questions of fact as questions of law.

If, therefore, there was any fact at issue, the existence of which would warrant a decree for the defendants, and the existence of that fact can by any reasonable inference be deduced from the evidence, the decree will not be reversed. In every case of contradictory evidence, the fact, of course, must be presumed in favor of the decree.

*There are two facts (to say nothing of the others) strongly [377 supported by the testimony, either of which, being found for the defendants, the decree must have been in their favor:

1. That J. C. Symmes, when he sold the fraction to Denman, reserved a lot to be located at his election.

2. That Ludlow subsequently relinquished to Symmes the lot in question.

At that period, there being no statute of frauds in the state, a parol contract relating to lands was valid, and gave Symmes a clear equity paramount to Ludlow, the very agent with whom the agreement was made; and it appears from the phraseology of the decree, that it was rendered upon this point, as it declares the equity to be with the defendants.

Heirs of Ludlow v. Kidd's Heirs and others.

There are various principles of law which support the doctrine stated above.

Every presumption is in favor of the correctness of judicial decisions. It is always presumed that they are correct, unless the contrary appears. The error must be manifest, or there is no error. On this principle solely, rests the verity attached to all judgments and decrees. The evidence to justify them is always presumed unless the contrary appears.

The special provision by statute, as well as by practice, for a *re-hearing*, precludes the idea of re-examination of fact on a bill of review. A rehearing is understood by every lawyer to embrace fact as well as law; but it is specially confined to a short period of time and certain rules; what propriety in such rules and restrictions, if a review answers the same purpose? And if facts can be re-examined on review, no possible distinction can be pointed out between the two proceedings.

The rule for which I contend is in harmony with all other judicial proceedings; at law, facts once settled are never disturbed; the judgments of law being once passed upon them, there is no possible mode of again canvassing them while the judgment remains. Chancery practice evidently rests upon the same principles and distinctions. Here is the rehearing in place of the new trial at law; and the bill of review in place of the writ of error. The practice is 378] *founded in both upon great principles of public policy. *Interest reipublicæ ut sit finis litium*. And surely there would be no end to litigation if the court could be required, after ten or twenty years, to canvass over again a volume of testimony, and decide whether they now receive the same impressions from it, as they did on the first investigation.

STORER, for complainants:

The point taken, that the errors in law, on which the prayer for a review is predicated, must appear on the decree, and can not be asserted of any fact proved in the cause, we admit to be the settled doctrine of the books. But this admission, however, is accompanied with our views of what a decree in chancery must contain, under the practice in England, as well as what the statute of this state, in force when the suit was determined, required to be inserted in the record.

We contend that a final decree, under the English practice, must

contain a full statement of all the facts on which the chancellor's decision is founded. The manner in which proof is made of these facts need not specially appear; but it is essential that satisfactory evidence of their existence should be embodied in the decree. If the mere opinion of the chancellor, on the merits of the cause, is the only part of the case on which error could have been assigned, all examination of the complainant's bill, and of course his right to sustain it, would have been excluded; and it would seem that the technical rule contended for by the defendant's counsel in the present case would produce that gross absurdity, that a court of equity may entertain jurisdiction in any case, no matter how palpably unjust, and no subsequent investigation can be had, provided the decree contains any grounds that would seem to warrant the interference of the chancellor. The history of a bill in chancery, from its inception to the enrollment of the final decree, will, it is believed, furnish no argument against the position we have assumed. In fact, the extreme caution that is exercised in obtaining all the light that can be shed on the cause, by a reference to a master, and issues directed to be tried at law, to say nothing of the opportunities afforded to object to the *master's report, as well as to move [379 for a new trial, while it affords strong reasons against the propriety as well as the policy of re-examining the facts on which a decision has been made, it nevertheless would seem to require that every material fact proved should be contained in the decree. The rules on this subject are very fairly detailed in Hinde's Ch. Practice, 429, and 1 Harrison's Ch. 418. These two writers have treated the matter more perspicuously than any modern author. If the point contended for is correct, let us examine for what errors in the decree a bill of review may be sustained.

In 1 Harrison's Chancery, 452, 453, it is said, "and yet if the chancellor errs in his *conscience*, upon a matter of *fact* proved before him, there may be a review of this *matter*, because there needs be no new examination, but this may be reviewed on the old depositions, which is usual." To this point, 1 Roll. Abr. and Chancery Cases, 45, are cited.

Before, the strict rule, which now obtains in England, that the decree must present a history of the case, with the facts proved to warrant the chancellor's decision, it sometimes happened that decrees were very loosely drawn, and many material points of evidence omitted. The question, as might have been expected, arose

Heirs of Ludlow v. Kidd's Heirs and others.

how far the unsuccessful party was precluded from a resort to his remedy, by review, by such decrees, and the same argument was then urged, that we would now press upon the counsel opposed to us, "that if such decrees, which merely contained the determination of the court, without any reference to the facts of the case, should be conclusive, the bill of review could never be brought." The lord keeper, in *Brand v. Brand*, 1 Vern. 213, after the point we have alluded to had been discussed, decided, "that he would not allow that way of drawing up decrees, in general, but that the facts that were proved, and allowed by the court, as proved, should be particularly so mentioned in the decree; otherwise, if a bill of review was brought, these facts should not be taken as proved. For *else*, a decree could never be reversed, by a bill of review, but all erroneous decrees must be reversed by an appeal 380] to the House of Lords. And the same *decision, to its fullest extent, is to be found in *Benham v. Newcomb*, 1 Vern. 216.

The authorities cited by the defendants prove no more than we are willing to admit, when it appears the decree has been properly drawn up and enrolled. We insist, however, that the remedy sought by the present complainants is a statutory one, and must be governed altogether by the rules prescribed in the act regulating our chancery practice. The policy of our legislature, let it be mistaken or not, appears to have been to dispense altogether with the long and tedious recitals usually found in a decree in chancery, and to substitute the whole record that was before the court. The law of 1810 was in force when the case sought to be reviewed was decided, and in the *thirty-third* section it is made the duty of the court, "*to cause the facts on which they found their sentence, or decree, fully to appear upon the records, either from the pleading and decree itself, or from a state of the case agreed by the parties or counsel, and where the parties or their counsel can not agree on the facts, then the court may either cause the examination of the witnesses to be reduced to writing by some person named by the court, which being read to, approved of, and signed by the examinant, shall be entered on record, and made use of on the trial of the cause, either at that time, or at any future hearing of the same.*" In section 39 the clerk of the court is required "*to enter together in order, the petition, answer, pleadings, reports, decretal orders, statements of facts found by the jury, or agreed by the parties, and decree in such cause, in a book to be kept for that purpose, which shall be signed by the court at the next*

 Heirs of Ludlow v. Kidd's Heirs and others.

term, as of the day on which such decree was pronounced; but such decree shall not CONTAIN any RECITAL of the petition, answer, or other pleadings." And in section 63, it is expressly provided that a bill of review may be brought "*upon errors of law, appearing in the BODY of the decree, or PROCEEDINGS themselves."*

It is believed, then, that an answer is furnished to the defendants' objections on this part of the case. We claim nothing more under this bill, than we should ask, if we were arguing a writ of error in a court of law. We look alone to the record; we have assigned all our errors upon the record. We, therefore, conclude that whatever is *found there is open for examination. It is [381] said that the evidence, in a court of law, is no part of the case, when application is made to reverse the judgment, unless it appears in a bill of exceptions. True, but if the law required the note or other contract to be recorded, it is presumed it is as fair a subject for future investigation, before the proper tribunal, as the declaration, or plea. Before the statute of 1824, the writ was no part of the record at law; and no matter how informal it might be, unless the defendant moved to quash it, at the appearance term, or to set the subsequent proceedings aside before judgment, for irregularity, he was forever precluded; under the present law, it is presumed, no one will doubt the right to predicate error on a substantial defect in the mesne process, and certainly not on a special verdict, however solemn may have been the adjudication of the court, on the law arising from the facts found by the jury.

In the present case, it will be recollected, no facts were found to be proved by the court, and the only grounds they could have had for making the decree are contained in the bill, answer, exhibits, and depositions. If these are disregarded, the arbitrary decision of the chancellor, unsupported by evidence, can at any time conclude the parties litigant. The complainants have a right, with certain limitations as to time, to claim a review of the decree sought to be reversed. If successful in their application, they must be restored to the same legal privileges which attached to them before the decree was made. Hence we infer, in addition to the positive provisions of the statute, a necessity that the circumstances on which that decree was founded should again be open for thorough examination.

Judge BURNET, having been original counsel for the complainants, did not sit in this cause.

Heirs of Ludlow v. Kidd's Heirs and others.

By the COURT :

In bills of review, the practice of this court has been to examine the whole case, and decide as if the matter was open before them in the same situation as it was when the decree was pronounced. 382] When the facts proved and *principles decided are not inserted in the decree, a bill of review, for error in law, would be useless if this course was not pursued. It is attended with some inconveniences, but greater mischief would probably result were we to decline reviewing any decree where, from the nature of the case, a brief general decree would, on its face, be free from error. In the case now before us, however, we may be satisfied that the decree of dismissal is unsupported by any possible deduction from the facts in proof. The complainants would be without remedy if we were confined to the examination of the decree alone. Whether it be erroneous or not must depend upon facts on which it was predicated. As they are not recited, we can only find them by an examination of the proofs.

This mode of proceeding has not heretofore been controverted. The general adoption and acquiescence in the practice, both by the bar and the court, evinces a general sentiment as to its correctness and utility.

The difference between our practice in drawing up and entering decrees and the practice in England and New York sufficiently accounts for the departure, amongst us, from what is elsewhere an established rule of proceeding. On this point the demurrer must be overruled. It must also be overruled generally. But, as the cause may again come before us, we do not express the grounds upon which we go on the second point.

The court pronounced a decree reversing the original decree of dismissal, and made an order that the bill of review be retained as a supplemental bill, and stand for plea or answer, and that the cause be proceeded in as upon original and supplemental bills.†

†NOTE BY THE EDITOR.—The same principle contained in this case is found in vii. 184, part 1; xv. 313; xvi. 145. The English and American practice is, that in the former the decree contains a statement of the facts upon which it is based, in the latter it *usually* does not, but the bill, answer, other pleadings, and decree are made part of the record, and in both countries the record must show the error complained of; and in Ohio, when the facts are found in a decree, they will not be reviewed, and the English practice will be adhered to, xv. 313; xvi. 412. For Ohio decisions touching reviews generally, see the

Tiernan v. Beam and others.

M. TIERNAN v. BEAM AND OTHERS.*[383]**

As between vendor and vendee, the vendor has a lien upon the lands sold, for the purchase money, although personal security be given for the payment.

Lien of the vendor of lands for purchase money passes to the devisee of the debt due upon account of such purchase, where the legal title remained in the vendor.

In an entire contract for the sale of five quarter sections of land, a separate bond given for the conveyance of two, purchaser can not have specific performance without performing on his part the entire contract.

Conveyance made by executors under a defective order of court can not be aided in equity.

THIS cause was reserved for decision here by the Supreme Court sitting in Richland county. It was argued by

J. C. WRIGHT, for complainant.

WM. STANBURY, for respondents.

The case is fully stated, and the arguments of counsel noticed in the opinion of the court by Judge BURNET. It is, therefore, deemed unnecessary to swell the report by inserting more than that opinion.

Opinion of the court, by Judge BURNET:

There is some contradiction in the testimony, and some inconsistency in the statements of a part of the witnesses, but the leading facts on which the case must depend are sufficiently ascertained. The bill, answers, and exhibits show that in 1811 Newman sold to the defendant, Beam, five quarter sections of land, containing eight hundred acres, at four dollars and fifty cents per acre, amounting to four thousand four hundred dollars. For two of these quarter sections Newman had obtained a patent. The remaining three had not been paid for, in full, to the government, and consequently

above cases, and vii. 125, part 2; viii. 377; xii. 351; xiv. 122; xvii. 27; xviii. 146. For Ohio statutes now in force touching bills of review, see Swan's Stat. 714, 717; xlv. 90.

Tiernan v. Beam and others.

were held by certificates of purchase. Beam was to complete the payments, and, to enable him to do so, the certificates were assigned. The legal title of the two quarters remained in Newman, who gave a title bond in the penal sum of seven hundred and fifty dollars, with a condition to convey them on the payment of that sum. One thousand two hundred dollars of the purchase money was paid in hand—notes, or sealed bills, with the defendant Hedges as security, were given for the residue, payable by installments. Newman, the vendor, died in 1813, having devised the notes to his widow, one of the defendants in this suit. Payments were made by Beam to Newman in his life, and to his widow since his death, by which the debt has been reduced to one thousand one hundred 384] and *sixty-seven dollars and seventy-six cents. After the death of Newman his executors obtained a general order of court to execute deeds. The order is admitted by both parties to have been illegal and void. The executors, however, executed a deed to Beam for the two quarter sections in question, on the supposed validity of that order. The complainant obtained a judgment against Beam in August, 1817, in Belmont county, on which there is a balance of one thousand two hundred dollars due. Execution on this judgment was sent to Richland county and levied on the two quarter sections not conveyed, there being, as it is alleged, no other property on which the money can be made. The object of the bill is to subject the two quarter sections to sale for the satisfaction of the complainant's judgment. The principal matter in dispute is whether the court will require the defendants, or those holding the legal title, to part with it for the benefit of the complainant before the residue of the purchase money is paid.

The principal points discussed by the counsel are the following:

1. Had the vendor a lien on the land for the purchase money?
2. If he had such a lien, has it been lost or relinquished by the subsequent conduct of the parties?
3. Did the payment of the sum of seven hundred and fifty dollars, named in the bond, entitle the purchaser to a deed for the two quarter sections before the whole of the purchase money due on the contract was paid?
4. Will the court give effect to the deed made to Beam by the executors of Newman, agreeably to the prayer of the bill?

On the first point, the authorities clearly show that a vendor has

Tiernan v. Beam.

a lien on the premises sold for the purchase money, and that his lien is not affected by conveying the premises and taking a note or bond, with personal security, for the money. It exists in every case of a sale where the money is not paid, unless it be otherwise agreed to by the parties, either expressly or by such arrangements as clearly show their intention, and it is incumbent on the party contesting the lien to show that it has been relinquished. *9 Ves. 209; *Turner v. Bayne*, 1 Johns. Ch. 308; 2 Ves. [385 622; 3 Eq. Cas. Ab. 682; [n] 1 Vern. 267; 3 Atk. 272; 6 Ves. 752; 3 Bibb, 183; 2 Wash. 142; 1 Brow. Ch. 301. In Pennsylvania and in South Carolina the right of the vendor to his equitable lien seems not to have been recognized, but it has been admitted and enforced in most of the state courts, and in this court, as often as the question has been presented. *Jackson v. Hallock*, 1 Ohio, 318. As between vendor and vendee the rule is not questioned by the counsel on either side. But on the part of the complainant it is strenuously contended that it does not exist in favor of these defendants, and a variety of circumstances have been referred to for the purpose of taking the case out of the rule. As, for example, the vendor took obligations with personal security for the purchase money, and that those obligations were payable by yearly installments. The first part of this objection has been disposed of already, and it is not easy to discover why the fact that the money was payable by installments should change the rights of the parties. That circumstance can not affect the contract, or the consequences resulting from it. As to everything connected with this question, it is immaterial whether the money be payable in a gross sum, or by installments, on different days. It was also urged that because the legal title was retained by the vendor for a time and afterward conveyed, with the assent of the devisee, we must draw the conclusion that the parties did not intend to have a lien reserved. To rebut the inference drawn from this circumstance, it is only necessary to state that the retaining of the title by Newman till the time of his death evidences a determination on his part to hold the land as his security; and that as the executors were not privy to the contract, and were ignorant of the intention and understanding of the parties at the time it was made, their attempt to convey the land after the death of Newman can not have any bearing on the question; we can not draw from it an inference inconsistent with the manifest design of the

Tiernan v. Beam and others.

vendor. But this question does not rest on this inference alone. The testimony of Pearce proves that it was a part of the contract [386] that Newman *should hold the land as security for the money. Such proof, however, was not necessary on the part of the defendants. The existence of the lien must be presumed until the contrary appears. It rests with the complainant to show that the vendor did not rely on it.

The second inquiry is, has the lien been lost by anything that has taken place since the contract was made. The complainant contends that if the lien did exist in the life of Newman it ceased at his death, and that the devisee can not claim it, because by the devise the debt has been separated from the land.

The case of *Jackman v. Hallock*, 1 Ohio, 318, has been cited to sustain this position. That was a claim set up by the assignee of a note in the life of the vendor. It was a transaction between the living. A majority of the court were of opinion that the lien did not pass by the assignment. But the circumstances of the two cases are materially different, and the decision in that case does not necessarily conclude this. The force of the argument used on that occasion seems to be that the vendor may separate the equitable lien from the legal right, that he may assign the latter, but can not pass the former, because it is given for his own exclusive benefit. Adopting this reasoning as conclusive, it admits that while he retains the legal right, the equity will attach to it, and, upon that principle, if he retain them united till his death, they must both descend to his heir, or pass to his devisee, because the act of God shall not injure any man. The death of a vendor can not impair his rights. They must pass to his representatives in the condition in which they were at his death. If the debt, in the hands of Newman, during his life, was an equitable lien on the land, it must continue so in the hands of the heir or devisee, for at his death all his legal and equitable rights pass, by operation of law, in the same state in which he held them. No good reason can be assigned why any of them should be forfeited by an act of Providence not under his control. The duration of an estate may be limited by the term of the grant to the life of the grantee. But such a limitation was not contemplated by the parties in this case. The rights mutually acquired were intended [387] to survive. *There was nothing in the nature or terms of the agreement inconsistent with such an incident, and I do not see

Tiernan v. Beam and others.

by what rule of construction a limitation can be applied to the equitable that does not equally affect the legal right. The security for the debt should be as permanent as the debt itself. They ought to exist and expire together. The object of the one was to insure the enjoyment of the other, and if either is to be forfeited by the death of a party, I am at a loss to determine which it should be. The lien of a vendor is not founded on arbitrary principles that require a rigid construction. It is not of such a nature as should induce a court to lay violent hands on it whenever a plausible pretext can be found for doing so. It is founded on principles of justice, and ought, therefore, to be protected. It originated in the care which the law has for the preservation of equitable rights. It was intended to prevent one man from enjoying the property of another without consideration, and it therefore applies as well to the representative of a deceased vendor as to the vendor himself. It is in the nature of a mortgage, provided by the benignity of the law for those who may have been too confiding; and, in my estimation, our legal system would be imperfect without it. The great object of every code of laws is to prevent injustice, and the more effectually that end is accomplished the nearer does it approach to perfection. Justice certainly requires that real property, sold on contract, should be answerable for its price as far as is consistent with the safety of third persons. Hence legal mortgages have been resorted to, and the doctrine of equitable liens has been established; and as these securities are similar in their operation, and have originated from the same policy, they ought to be equally favored. In *Martin v. Mowlen*, and *Green v. Hart*, 2 Burr. 979; 1 Johns. 590, mortgages are treated as chattel interests, which may be discharged by parol, not being within the statute of frauds.

This would show that there is no essential difference between legal and equitable mortgages as to the solemnity required in their discharge. They both originate in contract, the one by express stipulation, the other by operation of law.

*From this view of the subject it seems to be a just conclusion [388] that the death of Newman did not extinguish his lien on the land in question, and that the right survived for the benefit of those to whom it legally belongs.

As the death of Newman, and the attempt to convey by his executors, are the only circumstances which have taken place since

Tiernan v. Beam and others.

the contract was made, calculated, in the opinion of counsel, to destroy the lien, and as neither of these is sufficient for that purpose, the conclusion follows that if the lien ever existed it continues to exist.

But before this point is dismissed I will notice some of the authorities cited by counsel as having a bearing on it.

Much importance is attached to *Pollexfen v. Moore*, 3 Atk. 272. The defendants rely on it to establish the lien, and the complainant quotes it to show that the lien expired at the death of the vendor. It has often been remarked that the report of that case was very obscure, and the master of the rolls in *Trimmer v. Bayne*, 9 Ves. 210, affirms that Lord Hardwicke destroys his own dictum, that "the equity will not extend to a third person," by the decree which he makes in the same case. The object of the cross bill was to protect a legacy given out of the personal estate, either by requiring the complainant in the principal bill, who was a vendor, seeking for his purchase money, to resort to his equitable lien or otherwise, if he were allowed to exhaust the personal estate to the prejudice of the legatee, that she might succeed to his equitable right; and in the face of his own dictum the chancellor marshaled the assets, so as to give her all the relief she was entitled to. He established the equitable lien, and confined the vendor to that fund, by which the personal estate was so far preserved for the legatees. In other words, he decided that the land, after it had descended to the heir of the purchaser, should be bound for the purchase money, for the benefit of a person not a party to the contract; and not only so, but that the vendor should resort to that lien, and exhaust the fund in the first instance. The object of the cross bill was therefore gained, and the equitable lien enforced for the benefit and at the instance of a third person.

389] *So far as the principle really settled in that case has a bearing on the dictum of the chancellor, it appears to condemn it, and to favor the conclusion that it has been introduced by the carelessness or misapprehension of the reporter. It appears, however, to be the foundation of the doctrine now contended for, and to have led to all the controversy on the subject, which is found in the subsequent cases. But the object I had principally in view in turning to that case, was to distinguish it from the case before us, by showing that these defendants can not be treated as third persons in the sense in which the chancellor used the phrase. Mrs.

Tiernan v. Beam and others.

Moore, whom Lord Hardwicke denominated a third person, was not concerned in the sale, or purchase of the land; she had no interest, either original or derivative, in the purchase money. Her claim had no connection with the debt created by the purchaser, or with the lien which the law created for its security. She was, in the literal sense of the words, as to that transaction, a third person, a stranger, seeking to protect a legacy, that had no relation to the sale of the land, and in which the vendor never had an interest. Her prayer was, if the vendor did not avail himself of the lien, that the court would place her in his shoes, and transfer to her his equitable right. A simple statement of the case shows that it is not analogous. Mrs. Newman, in this sense, is not a third person, she can not be called a stranger to the transaction, she has succeeded to the rights of her husband, resulting from that contract—she stands in the shoes of the vendor, and as the legal owner of the debt, claims the benefit of the security attached to it. She is the only party in interest. The lien can not operate in favor of any other person; she does not attempt to meddle with the rights of others, and can not therefore be denominated a third person.

The case ought not to be carried further than its terms necessarily require. Subsequent cases should not be brought within its influence by remote analogy. Mortgages are considered as inseparable from the debts to which they relate. They follow them as the shadow follows the substance, so that any act amounting to a legal transfer of the debt will carry with it the mortgage. In *Martin v. Mowlen*, *2 Burr. 973, Lord Mansfield states it as [390] a settled rule that a mortgage, being a charge on the land, whatever will give the money will convey the estate in the land along with it, to every purpose. If the debt be assigned, devised; or discharged, without naming the mortgage, the mortgage will share the fate of the debt. The right in it passes by operation of law, rather than by the act of the party. *Green v. Hart*, 1 Johns. 580, adopts the same principle. The dictum of Lord Hardwicke, as it is expounded by the complainant, would be inconsistent with the doctrine maintained in these and other cases of similar import. But it appears to me that it can not be applied to a person who has required an interest in the debt, and with that limitation, it has no unfavorable bearing on the claim of the defendant, nor does it conflict with the cases just cited.

Tiernan v. Beam and others.

It must be recollected, however, that the matter directly in contest between these parties, is the two quarter sections not conveyed by Newman in his life. The three quarters which were conveyed, have been disposed of. As to these quarters the defendants certainly stand on higher ground. They have the legal title, against which the complainant is setting up an equity, and the question is, whether the court will deprive them of that title, and if they will, upon what terms. In deciding this question, it is necessary to consider on what ground the complainant stands. He had no concern in the contract, and as a party, he has no interest in it. He is pursuing the rights of Beam, in the character of a creditor, and any circumstances of hardship, in his own case, are not to be considered here. He stands in the shoes of Beam, and the case must be decided as though Beam were the complainant, praying for a specific execution of his contract. Viewed in this light the complainant must do equity before he can expect to receive it.

Whatever might have been the understanding of the parties, we find the defendants with the law on their side, and with an equity at least as strong as that of the complainant. The purchaser is insolvent, and the defendants must lose the purchase money if they are compelled to give up the title, which is the only plank 391] on which their hopes can rest. I do *not know on what principle Beam can extort it from them, before he has complied with his part of the contract. It certainly was not the intention, or expectation of those concerned, that he should have the land without paying for it. If the title had remained in the vendor by mere accident, I could not hesitate to say that equity ought not to take it from him till the contract is fulfilled. But in this case there is both positive and presumptive evidence that Newman relied on the title and retained it as his security.

The third inquiry is, did the payment of seven hundred and fifty dollars, the sum named in the title bond, entitle the purchaser to a deed for the two quarters, before the whole of the purchase money due on the contract was paid? The counsel for the complainant have treated the case as though there were two contracts, one relating to the three quarters conveyed, and the other to the two quarters not conveyed, and on that ground they claim a right to the two quarters, because they allege the purchase money for them has been paid in full. But they have

Tiernan v. Beam and others.

certainly taken an incorrect view of the subject, for in the first place there is not anything that indicates two¹ contracts, and in the second place, the most rational conclusion, as to the payment is, that they were not made with reference to one portion of the land, more than another.

The defendants allege, positively, in their answers, that the five quarter sections were sold in a body, at the average price of five dollars and fifty cents per acre, amounting to four thousand four hundred dollars. Henry Bell, Michael Newman, and Michael Beam, Jr., testify to the same fact. They prove that the land was sold *in a lump*, at an average price, and by a single contract. The testimony of Pearce amounts to the same thing. He heard the parties speak of the transactions as one contract, and understood from them that the land was bound. In addition to this, the nature of the transaction and the circumstances attending it, show clearly that there were not two contracts. There was a great difference in the value of the quarters, both as to quality of soil and improvements. Some of them were entirely unimproved, a part of them were improved to a considerable extent, and yet they were sold at an average price. This could not have been the case, if they had been purchased *separately. The [392 sum of twelve hundred dollars paid in hand was deducted from the amount of the five quarters, and notes with security were given for the residue, without distinguishing for what particular portions of the land they were given, and all the quarters were purchased at one and the same time. From these circumstances, independent of the testimony, the inference is irresistible, that the five quarters were purchased by one and the same contract. The execution of the title bond is no evidence of two contracts. It was the natural consequence of the difference in the situation of the title. As there was money due to the United States on three of the tracts, which was to be paid by the purchaser, it was necessary to assign him the certificates for those tracts, to enable him to complete the payment, and as the vendor was to retain the title of the two, for which patents had been obtained, it was natural to give a title bond, and as it was the understanding of the parties that all the land was to be bound for the purchase money, and as obligations had been given for the whole amount, the sum named in the title bond was most probably accidental. There is no rule of calculation suggested by the case, from which it can be ascer-

Tiernan v. Beam and others.

tained that seven hundred and fifty dollars was due on the two quarters. At the average price, they amounted to seventeen hundred and sixty dollars. If the whole payment of twelve hundred dollars, be deducted from them, the sum due would be five hundred and sixty. If a proportionate part be deducted, the sum due would be twelve hundred and eighty dollars.

The admission so much relied on, that seven hundred and fifty dollars had been paid, amounts to nothing, for it appears from the testimony of Mr. Parker, that at the time those declarations were made, the payments amounted to more than three times that sum, as the original debt had been reduced to eleven hundred and sixty-seven dollars. But there is not the slightest reason to suppose that any part of this money was paid with special reference to these quarters. Counsel have labored to give the case that aspect, but without success. The facts do not sustain it.

The fourth and last inquiry is, will the court give effect to the deed executed by the executors?

393] *Chancery may aid a deed, rendered inoperative by accident, or mistake, when the grantor had power to convey, and intended to do so, but it can not generally supply a want of power. It can not give effect to deeds executed by persons who have neither title, nor authority to convey, from those who have the title. The deed from the executors of Newman to Beam was unauthorized and illegal. Its operation was not prevented by a defect in the form, or in the execution of it, but by a total want of power to convey, which no court of equity can supply. A decree may remedy a mistake in a conveyance by a person having power to convey, but it can not create a power. The former is often done, when the rights of third persons are not affected, or when equity would, in the first instance, have decreed a conveyance. But in this case the executors attempted to convey without authority, and if their deed had taken effect, it would have been injurious to third persons. The statute has pointed out the only method by which executors or administrators can obtain power to sell real estate, or to execute contracts for the sale of it, made by their testators, or intestates. It is necessary to pursue that course, in order to obtain the power, and an attempt to convey, before they have done so, must be wholly inoperative. The power must be obtained from the common pleas, and it would not be more irregular, for this court to grant the power in the first instance, than to remedy a want of it

Tiernan v. Beam and others.

after a fruitless attempt had been made to execute it, and besides, when application is made to the common pleas, for an order to execute a contract, it is their duty to see that the contract has been fairly made, and fully complied with on the part of the purchaser, and if they should unadvisedly, order a conveyance, while any portion of the purchase money was due and unpaid, it would be contrary to the statute, and such a fraud on the heirs or devisees as would justify the interference of this court for their protection. There are two circumstances, then, which prevent us from giving effect to the deed made by the executors of Newman:

1. They made it without having obtained a power for that purpose from the court of common pleas.

*2. As the contract had not been fully complied with on the [394 part of Beam, the common pleas were not authorized to grant the power, and if they had made an order for that purpose, it might have been avoided as a fraud, on those who were interested in the contract; so that the question resolves itself into this, will chancery give effect to a deed made without authority, and under such circumstances as would authorize them, if an authority had been granted, to lay their hands on it as a fraud on third persons?

The complainant seems to rely much on the alleged equity of his case. But if he has an equity it can not aid him, because the defendants have an older and a stronger equity. It does not appear when the debt to Tiernan was contracted, nor is it material to know. His judgment was rendered in 1817. The lien of the defendants has existed since 1811. The equity of the complainant extends only to that portion of interest that would remain in Beam, after all prior equities are satisfied. On this principle he is to be postponed to the defendants who hold an older equity. The defendants have also the strongest equity. Newman was the proprietor of the whole property. He was not bound to sell it; and after he had contracted to sell, he was not bound to convey, till the consideration money was paid. Beam had no right to appropriate it to his own use, or to the use of his creditors, further than he had made it his own by paying the purchase money. Were we now to appropriate the proceeds of this land to the satisfaction of the judgment, we should virtually decree the estate of Newman to pay the debts of Beam, without a previous liability, and without a consideration; but, on the other hand, if the complainant receives what the land is worth, more than the residue of

 Tiernan v. Beam and others.

the purchase money due on the contract he will obtain all the right of his debtor, beyond which he has no equitable claim. The complainant's counsel, to strengthen himself on this point, urged very earnestly that Beam had treated the land as his own—that it was reputed to be his—that it gave him credit—and that the world was thereby deceived.

In a contest about personal property, as to which possession is *prima facie* evidence of right, such facts as these are entitled to weight and are sometimes decisive of the matter in controversy. 395] *but the occupancy of land is not considered as an evidence of title. No prudent man would rely on such circumstances, but would rather resort to the records, where the truth may be ascertained, and if he omit this precaution the consequences are chargeable to himself. But the argument drawn from this source is wholly gratuitous, because there is no evidence to show that Tiernan knew of such facts, or relied on them, when he gave credit to Beam. If the legal title had been conveyed to Beam, and the defendants were resting entirely on their equitable lien, there might be some plausibility in recurring to these circumstances; but the fact is not so, the legal title has not been conveyed, the defendants were not bound to vigilance, they had the same right to rely on their title, as a legal mortgagee has, and the same right to reply to the complainant, *caveat emptor*. It is readily admitted that facts of this description sustain the exception to the general rule made in favor of subsequent purchasers, for a valuable consideration, without notice, as to whom the equitable lien can not be enforced. It was also urged that Hedges considered the deed from the executors as valid, and supposed that he had no right to rely on the land as a fund to pay the purchase money for which he was bound to Newman. This may be so, but his ignorance does not forfeit his rights.

On the whole, we are satisfied that the sum due to the estate of Newman must first be paid out of the proceeds of the sale, and the residue paid over to the complainant.†

†NOTE BY THE EDITOR.—This case, so far as relates to the transferable character of the vendor's lien, is re-affirmed, v. 35. As to the same point, see also xiv. 20. Taking personal or real security, as between vendor and vendee, does discharge the vendor's lien, xiv. 428. But so far as this last case decides that taking real security discharges the vendor's lien, it is reversed by the decision in xvii. 500, where the opposite doctrine is held. It (xiv. 428) also overrules,

MICHAEL PATTON v. SHERIFF OF PICKAWAY COUNTY.

Under the judgment and execution law of 1824, levy made within a year from the date of judgment, and set aside after the expiration of the year, lien lost as against subsequent judgment creditor, whose levy is made within the year and continued until sale.

When a levy is set aside, parties stand in the same situation as if no levy had ever been made.

THIS was an amicable action, brought to decide the right of the plaintiff to certain moneys made upon execution. It came before the court, upon a case agreed, and was adjourned from the county of Pickaway.

The plaintiff, Patton, obtained two judgments against Bentley—one in July, 1820, and one in April, 1821. Upon both these judgments executions were sued out, in June, 1821, and on the 28th of that month, levied, on the real estate of *Bentley. In July, 1822, [396 the appraisement and the levy were set aside. On January 23, 1823, writs of *fi. fa.* were again sued out, and on February 22, 1823, were levied on the same property first levied upon, and on one additional lot. Alias process was sued out from term to term until January, 1826, when a sale was made.

At April term, 1821, J. Allen obtained a judgment against Bentley. In June, 1821, he sued a *fi. fa.*, which was levied on the same lots, July 21, 1821, and the process was regularly continued until the sale was effected in January, 1826.

There were other subsequent judgments, previous to January, 1823, upon which executions issued and levies were made. But as the two cases stated embrace the point decided in the opinion, it is unnecessary to state them.

as would seem, the law of the case to which this note is appended, so far as relates to the effect of taking personal security on the lien of the vendor. The case in xvii. 500, has, in the argument of counsel, and the majority and dissenting opinions, an elaborate exposition of our own and other decisions on this point. It is there decided that taking mortgage by vendor does not *de facto* extinguish his equitable lien for purchase money. Other decisions relating to vendor's liens, see vii. 21, part 1. As to correction of administrator's conveyances in equity, see also iv. 469; xiii. 368.

As to specific performance, see *Townsend v. Alexander*, ii. 18, and note.

Patton v. Sheriff of Pickaway Co.

Patton's first judgment secured the first lien. His second judgment was of the same term with that of Allen. None of the executions were sued out within ten days. Patton's were first sued out, and put in the hands of the sheriff. His levy was set aside in July, 1822. The levy of Allen was continued, and the question to be decided was, whether Patton lost his preference by setting aside his levy.

The reporter was furnished with no argument on either side.

Opinion of the court, by Judge HITCHCOCK.

In the present case, the court are called upon to give a further construction to the judgment and execution law of 1824. In the case of *McCormick v. Alexander*, ante, 65, delivered at the last term, it was determined that, *under that law, judgment creditors, who had not sued out and levied execution within one year from the date of the judgment, lose their lien and preference, as against subsequent judgment creditors, who had sued out and levied execution within the year; and this as well in cases of judgment before the enactment of the law as after it.*

It has been suggested that such construction *might* be given to 397] the *fourth section* of that act as would induce the *court to doubt the correctness of this decision. That section of the law was carefully examined before that case was decided; it has been since, with equal care, re-examined, and we discover nothing in it which can, in the least, tend to change the opinion then expressed. Although a court *may*, and undoubtedly sometimes *do*, in the examination of a statute, find some things which are not consistent with their ideas of policy or of justice, yet it would be highly improper to distort the language, or the evident meaning, in such manner as to give the statute a construction consistent with their own feelings, when such construction would manifestly defeat the intention of the legislature. The judgment and execution law of 1824 contains a system which is as well adapted, perhaps, for the State of Ohio, as any other which could be formed on the same subject. So far as it respects judgments, which shall be subsequently rendered, no one, it is believed, can, with propriety complain. If there is any complaint, it must be on the ground, that the statute extends to judgments which were rendered before its enactment. If this be an evil, it will soon be past. And to give a construction to any part of the statute which would destroy the harmony of the whole, in order to remedy this particular evil,

Patton v. Sheriff of Pickaway Co.

would be followed by consequences, the injurious effects of which can not be easily foreseen.

Section 4 above referred to, provides, "*that when two or more writs of execution, against the same debtor, shall be sued out during the term in which judgment is rendered, or within ten days thereafter; and when two or more writs of execution against the same debtor shall be delivered to the officer on the same day, no preference shall be given to either of such writs, but if a sufficient sum of money is not made to satisfy all executions, the amount made shall be distributed to the several creditors, in proportion to the amount of their respective demands; in all other cases, the writ of execution first delivered to the officer shall be first satisfied; and it shall be the duty of the officer to indorse on every writ of execution the time when he received the same.*" Provisions, similar in substance, have been contained in every law on the same subject for many years.

*In order to give a proper construction to this section, we [398 must, as in every other case, look through the whole statute, and, if possible, so construe it, that the whole may have effect, and that one part shall not defeat another. We must bear in mind, that the legislature in acting upon this subject are not legislating for a particular case. They are determining the rights of different judgment creditors, and also the rights of the judgment creditor and debtor. It is for these persons they are legislating, and as to others, they go no further than an attempt to provide, that in the contest between these their rights shall not be violated. Neither is the legislation confined to any particular species of property. Property in possession, whether real or personal, is taken into view.

By section 1 of the act it is enacted, "*that lands, tenements, goods, and chattels shall be subject to the payment of debts, and shall be liable to be taken in execution,*" etc. Section 2 provides, "*that the lands and tenements of the debtor shall be bound for the satisfaction of any judgment against such debtor, from the first day of the term at which judgment shall be rendered,*" etc. It is this section which gives the creditor a lien upon the lands of the debtor, in consequence of the recovery of judgment, but it extends only to the lands situated in the county where the judgment is rendered. For the same section provides that where the lands are situate in a different county, such lands, as well as the goods and chattels of the debtor, shall be bound from the time they are seized in execution.

Patton v. Sheriff of Pickaway Co.

The lien which is thus created, is by subsequent provisions of the statute regulated as to other *bona fide judgment creditors*; as to all the rest of the world it appears to be perpetual. By section 9 provision is made that if an execution be levied upon the lands of the debtor, and it shall appear by the inquisition required by the statute, that the lands thus levied upon, at two-thirds their appraised value, are sufficient to satisfy the execution with all costs, the judgment upon which such execution issued "*shall not operate as a lien upon the residue of the debtor's estate to the prejudice of any other bona fide judgment creditor.*" Section 17 determines the character, or continuance 399] of this lien. *Without repeating this section, it is sufficient to say, that by its provisions the lien is to continue one year, and for a greater length of time provided an execution be sued out and levied within *that* period. But if an execution is not levied within the year, the judgment shall not operate as a lien to the prejudice of "*any other bona fide judgment creditor.*"

Taking these parts of the statute together, it is apparent that a judgment operates as a lien upon the lands and tenements of the debtor, and that this lien is secured to the creditor for the term of one year. Within that time no individual can deprive him of it. But if not enforced within that period, it is inoperative so far as respects a mere diligent creditor.

If, in giving a construction to section 4 of the statute, we were to pay no attention to the priority of judgments, upon which executions were issued; if we were not to regard the description of property upon which such executions were levied, but were to determine that unless the executions were issued within ten days after the term in which judgment was rendered, or unless the executions were delivered to the officer on the same day, the one first delivered should be first satisfied, all that is said in the statute upon the subject of judgments, operating as liens upon the lands and tenements of the debtor, would be rendered nugatory. Lands and tenements, as well as goods and chattels, as to any beneficial effect, would be only bound from the time they were seized in execution. Such could not have been the intention of the legislature.

What construction, then, can this section receive, which will give it full effect, and, at the same time, not interfere with the other parts of the law. It appears to me that the intention of the legislature is easily ascertained. In this section, they intended to provide for cases where there were two or more judgment creditors,

Patton v. Sheriff of Pickaway Co.

having equal rights, and where there is no priority of lien, as when the judgments are recovered in the same term; for cases where the judgment does not operate as a lien, but the property is bound only from the time when seized in execution, as goods and chattels, or lands not situate in the county where the judgment is re- [400 covered; for cases where the creditor, in consequence of not having an execution levied within one year from the date of his judgment, has lost the benefit of his lien so far that it "*shall not operate to the prejudice of any other bona fide judgment creditors.*" If this section is construed to extend to these different classes of cases, it will be found to be beneficial; if extended further, it will defeat some of the essential provisions of the statute.

The case before the court differs only in one particular from the case of *McCormick v. Alexander*. In that case no execution issued upon the judgment of Evans, one of the creditors, within twelve months from the date of his judgment. In this case, Patton caused execution to be issued and levied upon part of the property which was eventually sold, within twelve months from the first day of the term in which his judgment was recovered. At the July term of the court of common pleas, 1822, however, this levy and the appraisalment made in pursuance of it, was, on motion of the plaintiff, set aside.

It remains, then, to consider the effect of setting aside a levy. It would seem that upon this subject there could be but one opinion. If the levy is set aside, as to all subsequent proceedings, the course to be pursued must be the same as if no levy had been made. Before the property can be sold, it must be again seized in execution. Had the *fi. fa.* been levied upon goods and chattels, so soon as the levy was set aside, the goods and chattels must have been restored to the debtor. Patton, while he abided by his first levy, was safe, but having elected to pursue a different course, if that course operates to his injury, he must abide the consequences.

The first levy of an execution issued upon the plaintiff's judgment, which can be noticed by the court, is the one which was made on February 22, 1823. This was more than one year after the date of the judgment. It follows, that according to the principle settled in the case of *McCormick v. Alexander*, he lost his lien so far, that the same could not operate to the prejudice of other *bona fide* judgment creditors, whose executions had been levied within twelve months after the date of their respective

Este and Longworth v. Strong and others.

401] judgments. This being *the opinion of the court, and it appearing that the money made will not be more than sufficient to satisfy judgments which must be preferred to that of the plaintiff, according to the terms of the agreed state of facts, judgment must, in the present case, be entered for the defendant.†

ESTE AND LONGWORTH v. D. E. A. STRONG AND OTHERS.

Decree in equity against guardian, touching the real estate of his ward, does not affect the ward unless he is made a party to the original suit.

Where a guardian has given a lien upon real estate, claimed by and in possession of his ward, such lien can not be overreached by the ward purchasing a paramount title.

THIS cause was adjourned from the Supreme Court of Hamilton county. It was a bill to carry into effect a decree pronounced in a case between E. Pearson, and S. R. Miller, guardian of the heirs of Elijah Strong, deceased. The interest in the decree had been transferred to the present complainants, in trust for certain purposes. The state of the case is as follows:

Pearson prosecuted a suit in chancery against Miller, as guardian of the heirs of Strong, to obtain a decree for the specific performance of an agreement, made as guardian, charging the rents of a house in Cincinnati, with a balance due Pearson, for erecting the house, upon a previous contract, as guardian, made by Miller, under an order of court to sell part of a lot to improve the residue.

Miller alone was made defendant, and a decree was pronounced against him for the specific execution of the contract.

†NOTE BY THE EDITOR.—There will be found in x. Ohio, 74, a most admirable summary of the legislation and judicial decisions in Ohio, relating to the law of liens [note "a"]. See also note to McCormick v. Alexander, ii. 65. The act of 1831, now in force, Swan's Stat. 479, sec. 23, is a re-enactment of the statute of 1824, on which this decision is based. See also note "b," on that page.

When mortgaged land is levied on, levy may be set aside and other lands taken, xi. 444; but not unnecessarily, ib.

Este and Longworth v. Strong and others.

Pending the original suit, the defendant, D. E. A. Strong, had attained his full age, and upon proceeding on a petition for partition had become the sole owner of the house and ground in dispute. And before this, Miller had made a lease, as guardian, for a term of years to the other defendants, upon which considerable rents had accrued and remain unpaid.

This bill was filed against D. E. A. Strong, the legal owner, against the lessees, and the widow, to whom dower had been assigned, to obtain the benefit of the original decree, and was so framed as to have no reference to any matter behind that decree.

*D. E. A. STRONG pleaded in bar.

[402

1. That the heirs of Strong were not parties to the original suit, and that, although Miller was his guardian when the alleged contract was made, yet before suit brought Miller was superseded and another guardian appointed in his place; and that before the decree was pronounced, he had attained his full age.

To this plea the complainants replied, that the new guardian permitted Miller to act as guardian, in controlling and renting the property; and that the defendant, Strong, after he had attained his age, sanctioned the acts of Miller. The defendant demurred to this replication.

2. The defendant pleaded that he had purchased and owned the property under a title paramount to that of E. Strong, for whose children Miller acted as guardian.

And the complainants replied, denying the validity of the title purchased, and asserting the continuance of the possession under the heirs of E. Strong, and the lease of their guardian.

To this replication also, the defendants demurred.

The decision of the court being confined to these two pleas, it is considered unnecessary to take any notice of the various other facts presented by answers and pleas in the cause.

C. HAMMOND, for complainants:

The original suit was well brought against the guardian alone. He had the sole power to lease the lands, and to receive the rents. He had equally power to make improving leases. Contracts made within the extent of his power binds the ward. 7 Johns. Ch. 154; Cro. Jas. 55, 98.

It was unnecessary to make the ward a party. He knew noth-

Estate and Longworth v. Strong and others.

ing of the transaction, and was incompetent to litigate the matter in dispute.

By his subsequent recognition of the acts of the guardian, the ward is concluded. 2 Wils. 129; 1 Swift's Dig. 58. It makes no difference that this recognition was of a different transaction.

The second plea is vicious in its principle. He who has incurred an estate, can not defeat his own incumbrance *by purchasing in a better title. Nor can he, while he remains in possession, compel one, to whom he has given a lien, to controvert, with him, a title he has purchased from a stranger.

CASWELL and STARR, for defendants:

If the original suit was well brought against Miller, as guardian, yet the decree can not bind the defendant, because he was of age when the decree was pronounced, and ought to have been made a party that he might have examined the existence and extent of Miller's act, affecting his rights. For the decree subjects rents that have accrued and must continue to accrue after he attained his age. 1 Har. Ch. 76; Coop. Eq. 33, 181; 1 Mad. Ch. 23, 34, 420; 2 Mad. Ch. 142; 1 Johns. Ch. 349; 2 Johns. Ch. 25; 3 Johns. Ch. 311.

The guardian could make no lease to bind the estate beyond the minority of his ward. 1 Swift's Dig. 51; Reeve's Dom. Rel. 326, 334; 7 Johns. Ch. 150; 1 Johns. Ch. 561; 10 East, 494; 2 Wils. 129; 6 Mass. 58; 2 P. Wms. 278; 2 Mass. 55; 1 Wash. 90.

The guardian does not so represent the estate of the ward, as that suits can be brought against him in relation to it. The ward must in all cases be the principal, and the guardian appointed to make defense may or may not be the regular guardian. 3 Bac. 412; 4 Mass. 436; Newl. Ch. Pr. 36; 1 Swift's Dig. 51.

Courts are ever vigilant in protecting the rights of infants. In some cases they are not concluded by their own admissions, and in England a day is given, after they come of age, to show cause against decrees being conclusive upon them. In some cases they have been permitted to do so, against a decree upon answer by their guardians. 3 Bac. 587, 613; 3 Atk. 626; 1 P. Wms. 503; 2 P. Wms. 401; 2 Mad. Ch. 353; 3 Johns. Ch. 367; 7 Johns. 580.

When supplemental bill is necessary, after decree in original bill, to bring new parties and new interests before the court, it is open to new parties to make all objections against the decree to

Este and Longworth v. Strong and others.

be rendered, that they might have against the original decree. 2 Mad. Ch. 407; 3 Br. *Ch. 392. And such is evidently the [404 character of the present bill.

The second plea proceeds upon the principle that the defendant, Strong, does not hold the property as heir at law, or in any connection with the estate of E. Strong, his father; but by title paramount. The allegation that Miller, as guardian, was in possession and in receipt of the rents, and that neither the defendant nor Hinde, from whom he purchased, was ever in possession, is no answer. If the Stronges had no title by inheritance, the possession of Miller, as their guardian, was an act of usurpation, and not of right, which can not affect the right he has acquired.

Opinion of the court, by Judge SHERMAN:

The bill, in this case, is filed to enforce a decree of this court, rendered in the case of Pearson v. S. R. Miller, as guardian of D. E. A. Strong and others, children and heirs of Elijah Strong, deceased, charging the rents of certain real estate with the payment of the balance due Pearson for improvements made thereon. It is carefully framed, to avoid bringing into litigation the matters controverted in the former suit. The defendant, D. E. A. Strong, the only party in interest, seeks to avoid the effect of the former decree by showing that Miller was not, at the time of filing the bill by Pearson, his guardian, and that he attained his full age before that decree was pronounced; and upon this plea, and the replication thereto, the question is made, whether the decree against Miller is conclusive and ought to be enforced against the defendants without reference to the facts upon which it is founded.

It is a general rule, that upon a bill to carry a decree into execution, the court will not, unless under special circumstances, examine the justice of the decision or the law of the decree; but, if the case be proper for their interference, will specifically execute the decree. There are cases where this rule has been relaxed and the decree been varied, if, upon examining the proofs taken in the cause, wherein the decree was made or the directions given, a mistake has been discovered. *Johnson v. Northy*, 2 Ver. 409; *West v. Skip*, 1 Ves. 245.

*It ought to be observed, that at the time of filing the bill [405 against Miller, in which the decree now sought to be enforced was rendered, all the defendants to this suit were in esse, claiming the

Este and Longworth v. Strong and others.

same rights to and interest in the rents in question as they do now, with the exception that D. E. A. Strong, one of the defendants, purchased, during the pendency of the former suit, the adverse claim of Hinde and wife to the lot out of which the suits in controversy arise.

If this decree should be enforced against the defendant, D. E. A. Strong, it would have the effect of incumbering his property with the payment of a large sum of money, on the ground that Miller, his guardian, had so subjected it, during his minority, without his ever having had an opportunity of showing either that Miller was not, in fact, his guardian at the time the supposed contract for building was entered into; or, if his guardian, no such contract was made, or any other matter going to impeach the justice or legality of the decree now sought to be enforced.

The extent of the power of the statutory guardian over the real estate of his ward, and how far he can lawfully incumber it for improvements or other purposes, it is unnecessary to consider in this case; for, if the power of the guardian be admitted to the extent claimed by the complainants, but has been so defectively executed as to render it necessary for the party claiming, under the act of the guardian, to resort to a court of chancery to charge the estate of the ward, it is proper that the ward should be a party to such suit; and a decree obtained against the guardian, as such, in a suit where the ward was not a party, would not be conclusive upon him. In those cases, where the legal right of the guardian is unquestioned, as to sell the personal property of the ward for his support and maintenance, and the contract of the guardian has been executed by the sale and delivery of such personal property to a *bona fide* purchaser, the sale would be binding upon the ward, and the property would vest in such purchaser without his being at all answerable to the ward for the faithful application of the purchase money. But if the contract of the guardian be executory, and it became necessary to resort to a court of chancery for its execution, the ward ought to be made a party to such

406] *suit; and any decree obtained against a guardian, in a suit in which the ward was not joined, would not be conclusive upon him nor enforced against him upon a subsequent bill founded only on such decree against his guardian.

But whatever might be the effect of a decree against the guardian of an infant, in his character of guardian, upon the estate of his

Este and Longworth v. Strong and others.

ward, the pleadings in this case show that this relation did not exist between Miller and the defendant, D. E. A. Strong, at the time of filing the original bill by Pearson nor at any time during the progress of the suit to its final termination, by the decree now sought to be enforced. Miller was not, at the commencement of that suit, or ever after, the guardian of D. E. A. Strong, and although he suffered the suit to proceed against him as such guardian, without objection or disclosing the fact of his not being such guardian, neither his silence nor unauthorized acts, however fraudulent and injurious to the complainants, can prejudice, much less conclude the rights of the defendant.

If D. E. A. Strong, after he arrived at full age, having a knowledge of the facts, had recognized and sanctioned the act of Miller in pledging the rents accruing from the city lot toward the payment of the improvements made thereon by Pearson, under the contract of 1817, it would be obligatory on him, and a court of chancery would enforce the contract against him. But this fact can not aid the complainants in this case, their bill being avowedly framed to charge the rents, on the ground of the decree against Miller, as his guardian, and not upon the contract of 1817, the improvements made by Pearson, and the recognizing that contract by the defendant, D. E. A. Strong, after he arrived at full age.

The decree is against Miller, as guardian of the heirs of E. Strong, deceased, and subjects the rents of certain real estate, belonging to those heirs, to the payment of a large sum of money, those heirs not being parties to the suit in which the decree was made. During the pendency of that suit the interest of all the heirs was vested in D. E. A. Strong, who had attained full age at the time of the rendition of the decree against Miller, and is now the only one of the heirs of E. Strong, deceased, interested [407 in the lot, the rents of which are charged with the payment of the claim of Pearson. Miller, the sole defendant in the former suit, although there described as the guardian of D. E. A. Strong, was not, in fact, at that time his guardian. To consider, under these facts, the decree rendered against Miller, as guardian, conclusive upon the rights and interests of D. E. A. Strong, would be manifestly subversive of some of the plainest and most obvious principles of law and justice. It would be directly adjudicating upon the property of an individual without giving him an opportunity of being heard, and that upon a pretense which is shown to be

Este and Longworth v. Strong and others.

false; for it is evident that the defendant, D. E. A. Strong, the only person claiming title to the property, the rents of which are affected by the decree, has never had an opportunity, directly, by himself, or indirectly, by his guardian, to object to the claim of Pearson, to have the rents applied in discharge of the debt due him for the improvements he made.

If D. E. A. Strong had been made a party to the suit of Pearson against Miller, it would clearly have been competent for him to have shown that Miller was not, at the time when the contract to pledge the rents was entered into, his legal guardian, or otherwise authorized to act for him, or in any manner incumber or dispose of his estate. If this decree could be enforced against him, because rendered against one called his guardian, without inquiry into its merits or the facts upon which it was founded, he would be forever concluded from showing that Miller was not in fact his guardian. This consequence may also result: that an entire stranger, by assuming the name and character of guardian of a minor, may dispose of the personal property, and incumber the real estate of such minor, in such manner as to be binding and conclusive, and the infant be driven to seek a compensation from the intermeddling stranger for the injury he may have sustained.

Whatever, therefore, may be the extent of Pearson's equitable lien upon the property of the defendant, D. E. A. Strong, to be reimbursed the amount of his expenditures, for lasting and valuable improvements made on said property *in pursuance of the contract of 1817, with Miller, as the guardian of the heirs of E. Strong, deceased, the matter contained in the first plea of the defendant, D. E. A. Strong, is a legal bar to the relief sought by the complainants in this bill, framed, as it is, upon the supposition that the decree in the suit against Miller, as guardian, is conclusive upon the defendants, and seeking only to enforce that decree; and that the legal effect of this plea is not changed by anything contained in the replication thereto.

Upon the question growing out of the second plea of the defendant, D. E. A. Strong, the court have never entertained a moment's doubt. E. Strong, the ancestor of the defendant, D. E. A. Strong, was in possession, and claimed title to the lot in question. Upon his death it descended to his heirs at law. A part thereof was sold by the court of common pleas, as his real estate, for the benefit of his heirs; the residue, improved by Miller as guardian of those

Barret v. Reed.

heirs, leased by him, as such guardian, for a term of years, and the lessor still continues in possession under the lease. If Miller, as guardian of the heirs, was legally empowered to improve the property (a question not made in this case), and to give a lien upon the accruing rents for the payment of the costs of those improvements, it is not competent for the heirs, by the purchase of a paramount title, to defeat the previous lien, legally acquired.

If Miller had no authority to incumber the estate, his act of pledging the accruing rents would be inoperative and void. But if he was authorized to incumber it, his act must be considered as the act of the heirs, equally binding upon them as if they, being of full age, had incumbered it; and it can not be permitted for a party creating a lien on an estate to defeat that lien by any act of his own. It has, upon this principle, been held that a mortgagor can not defeat the lien of the mortgagee by the purchase of a paramount title to the mortgaged premises. It would also be unjust, while the defendant is in the enjoyment of the rents and profits of the estate inherited from his ancestor, to compel the complainants to litigate the validity of the title of a stranger in order to enforce a lien created by the defendant.†

*OLIVER BARRET v. J. R. REED.

[409]

Quære, if a constable, pleading his official authority for making an arrest, can sustain such plea, by proving that he acted as a constable, and was reputed to be such?

If constable is duly elected, takes the oath of office, and gives a bond, he may justify acting as constable, although the obligee in the bond be not such as is required by law.

THIS was a writ of error to the judgment of the court of common pleas of Ashtabula county. The plaintiff in error was defendant in the court of common pleas, and the case was this:

†NOTE BY THE EDITOR.—What acts of guardian bind ward, etc., see also, for late cases, xiv. 228; xv. 655.

Barret v. Reed.

Reed brought an action of false imprisonment against Barret and others. Barret justified that he was a constable, and acted under process. The other defendants justified under Barret.

In support of this plea, Barret, in the first place, offered evidence to prove that he acted as a constable, and was generally understood and reputed to be such. This testimony was objected to and overruled, and Barret took a bill of exceptions.

It was then given in evidence, on behalf of Barret, that he had been duly elected a constable, had taken an oath of office, and had executed an official bond, made payable to the trustees of the township, in the proper form and with sufficient security. The sufficiency of this proof was objected to, because the law required the constable's bond to be made payable to the township treasurer, and not the trustees. The objection was sustained, and Barret took a bill of exception.

A verdict was found in favor of the other defendants but against Barret, against whom the court of common pleas gave judgment for the damages found by the jury, upon which he sued this writ of error, the decision of which was adjourned here by the Supreme Court of Ashtabula county.

GIDDINGS, for plaintiff in error:

It was sufficient to sustain the constable's justification that he showed himself a constable *de facto*, acting in that capacity, and reputed to be such. Gordon's case, 1 East C. L. 315; 3 Term, 632; 4 Id. 366; 6 Id. 663; 3 Johns. 431; 12 Johns. 296.

The bond made payable to the trustees, instead of the treasurer, was nevertheless a good bond. 1 Term, 291; 3 Hen. & Mun. 219.

410] *The reporter was furnished with no argument for the defendant in error.

Opinion of the court, by Judge HITCHCOCK:

In this case, a number of errors have been assigned by the plaintiff in error, two only of which have been particularly considered by the court. The first is that in which it is substantially alleged, that Barret, the plaintiff in error, having proven that he was a constable *de facto*, the court below refused to let him prove that he committed the act complained of under and by virtue of a warrant, to him directed, as constable, unless he would first prove

Barret v. Reed.

that he was a constable *de jure*. The second is that in which it is alleged that Barret, having proven, in addition, that he was duly elected a constable, that he took the necessary oath of office, and gave bond, conditioned for the faithful performance of the duties of his office, in all things conformable to the provisions of the statute, in such case made and provided, except that the same was made payable to the trustees of the township, instead of being made payable to the treasurer, as the law then required, the court below still refused to permit him to prove that the act complained of was committed *under* and by *virtue* of a warrant to him directed, as aforesaid, and in pursuance of which warrant, the defendant in error was arrested and imprisoned.

As it respects the first of those errors, and the question thereon arising, there is not a perfect coincidence of opinion amongst the members of this court. The principle contended for by the counsel for the plaintiff in error, is one which is recognized and sustained by the Supreme Court in the State of New York, as appears from the case of *Potter v. Luther*, 3 Johns. 431. The correctness of the principle, too, seems to be sustained by many of the English decisions. Nor is it perceived that any great evil could result from the establishment of such a rule in this state. In a government like ours, where most offices are elective, it can not be believed that there is any danger that any person will presume to discharge the duties of an office, unless he has, at least, some color of right; and should such thing be attempted, it would be an offense against the law, for the punishment of which ample provision is made.

*On the other hand, it may be urged with propriety, that [411 when an individual is sued in trespass, and would justify on the ground that the act complained of was committed by him while in the discharge of the duties of a public officer, it is in the power of such individual to show conclusively, whether or not he is entitled legally to officiate in such office; and to receive evidence of reputation, or of his being an officer *de facto*, would seem to be a violation of the rule, which requires that the best evidence which the nature of the case admits of shall be produced. Third persons are not supposed to know whether an officer has taken every necessary step to qualify himself; and, therefore, it is sufficient for them to show that he is such *de facto*.

As to the second error, above referred to, it is the unanimous

Barret v. Reed.

opinion of the court, that the exception is well taken, and that the court of common pleas, in making that decision, mistook the law on the subject.

It has been a law of the state from its first organization, and it is a law founded in sound policy, that sheriffs and constables should give bonds with security, conditioned for the faithful discharge of the duties of their respective offices. These officers have important duties to perform. They receive, in the ordinary course of business, large sums of money; and as they are the agents *constituted by the law*, not only of the *law*, but in some respects of *individuals* for whom they act, it is perfectly proper that every convenient method should be adopted to secure the interests of those who are compelled to intrust business in their hands. It would seem to me immaterial, however, to whom the bond is made payable. It is proper this should be fixed by law; and convenience dictates that the obligee should be a public officer, or body corporate, where there is perpetual succession. The obligee has no particular interest in the bond, and if suit is commenced upon it, can not, under any statute, be made liable for costs, in case of failure in prosecution. The obligee can be viewed in no other light than as a trustee for those who *are*, or who *may become* interested.

The statute in force at the time the act complained of in the present case was submitted, required that the constable should give bond in any sum not exceeding two thousand, and not less 412] than four hundred dollars, *with one or more securities, resident, etc., conditioned, etc., and payable to the township treasurer. The bill of exceptions states that Barret was duly elected constable; that he was duly sworn, and that he executed a bond, in all things conformable to the statute, except that it was made payable to the trustees of the township. Having done this, he proceeded to officiate as constable, and was recognized as such. The question which naturally presents itself here for consideration is, whether the bond thus executed was void. If it was not void, but obligatory on the obligors, the object of the law being to secure the interest of those who should be compelled to intrust business with the officer, that object is attained, and the law has been *substantially*, although not literally, complied with. A *substantial* compliance must excuse the officer. It is all that can, with propriety, be required of him.

Why is such bond void? Can any other reason be assigned

Barret v. Reed.

than that it is not according to the *letter* of the statute? There is nothing upon the face of it which is illegal. It is not given to secure the performance of an *immoral, vicious, or illegal* act. The sole object is to secure, on the part of one of the obligors, the performance of duties, which, if no bond had been required, he would have been bound to perform. Suppose there had been no bond required by law, would this bond have been void? I apprehend not, and it appears to me that the single circumstance that it is required by the statute, that a bond should be made payable to a different obligee, is not sufficient to destroy its obligatory effects. Upon the whole, I come to the conclusion that the bond, if not good under the statute, is good at common law, and that any person who should be injured in consequence of the neglect of the officer to discharge any duty appertaining to his official station, might obtain redress by suit upon it. 1 Wash. 91; 2 Call, 290; 2 H. & M. 459. Such appears to be the opinion of the courts of Virginia, in several cases by them decided. Or it may, perhaps, with more propriety be said, that the opinion of the court in those cases goes rather to establish the doctrine, that a bond, similar to the one under consideration, is substantially in compliance with the statute.

*It is stated further in the bill of exceptions, that the [413 bond had not been *accepted* by the trustees. 18 State Laws, 108. The words of the statute then in force, and which have been already referred to, are: "And every constable within ten days after his election or appointment, and before he enters upon the duties of his office, shall appear before the clerk of the township, and give bond, with one or more sureties, resident in the township, such as the trustees thereof shall *approve*," etc. The trustees as the guardians of the township, are to approve of the sureties. Whether they did so or not, we can ascertain only from the record, or rather from the bill of exceptions, which is a part of the record. It is there stated that Barret "proved that he had given bond *agreeably* to the statute, in all respects, except," etc. From this, it is reasonable to presume that the sureties were *approved* of, this being one requisition of the statute. It may, perhaps, be thought that this presumption is destroyed by the allegation, that the bond "had not been accepted by the trustees." There is certainly a difference between the *approval* of the "*sureties* and the *acceptance* of the *bond*." The one will most naturally *precede*, and

Barret v. Reed.

other *follow* the sealing of the instrument. Any formal acceptance of the bond is believed to be unnecessary. It is to be left with the township clerk, and by him filed away in his office. When it is said that a formal acceptance is unnecessary, I would not be understood that the trustees may not, if they deem the bond insufficient, reject it, and require another. But there are many things which would amount to an acceptance. If the bond is received without objection, it is equivalent to an acceptance. After having received it, and having it filed away by the clerk, in consequence of which the constable proceeds to officiate in his office, neither the trustees nor any other person can be permitted to say that it has not been accepted. To permit this would have a tendency to involve the officer in difficulty, and almost certain ruin. For it will be perceived that, by the law, as recognized by the court of common pleas, that a sheriff or constable who has not *specifically* and *literally* complied with every requisition of the law, before proceeding to officiate, although he may have done it *sub-414]* *stantially*, will be liable in **trespass* to every person he shall have arrested, and in *trespass* or *trover* for every article of property he shall have seized upon attachment or in execution. Whenever the constable has executed a bond, intended to be in pursuance of the statute, and is not notified that the same is not accepted, he may well suppose that he has done all, in this respect, which can be required of him.

Further, suppose the trustees do not accept the bond, or, in other words, suppose they disapprove of it, what is their duty? If the officer but neglects or refuses to give the bond, it is equivalent to a neglect or refusal to serve in the office. The office is, in fact, vacant. 18 State Laws, 28. By section 15 of the "act for the incorporation of townships," it is enacted "that when by reason of non-acceptance, death, or removal of any person chosen to any office in any township, chosen at the annual meeting, or in case where there is a vacancy, the trustees shall appoint a person to fill such vacancy," etc. By section 13 of the same act it is provided, "that any person elected to any office under this act, and not exempted by law, who shall neglect or refuse to serve in such office, shall forfeit and pay to, and for the use of the township, the sum of two dollars." It is further made the duty of the township clerk to sue for and recover the same. In the case of the constable, if no bond is executed, the office is vacant, and the trustees must appoint another person to

Barret v. Reed.

fill the vacancy. If it be *executed*, but is not *accepted*, the same consequence results. It must, of course, follow that if a bond be executed, and no appointment is made, as if to fill a vacancy, the presumption is irresistible that the bond thus made or executed is accepted, especially when the circumstance is added that no prosecution is instituted against the officer elect, for neglecting or refusing to serve in his office.

In the present case it does not appear that any appointment was made to fill the vacancy occasioned by the neglect or refusal of Barret to serve in the office to which he had been elected. It does not appear that he was prosecuted for such neglect or refusal. It does not appear that any exception was taken by those whose duty it was to except, to the bond which he had made and delivered, or any notice *given to him of such exception. Under these [415] circumstances he might well suppose, and undoubtedly did suppose, that he had taken all the necessary preliminary steps to qualify him to officiate in his office. He proceeded in good faith thus to officiate; and to make him liable in a case like the present, would be unjust and iniquitous in the extreme. It is that kind of injustice and iniquity which the law can not countenance.

Considering, then, that Barret had substantially complied with the law in the giving of bonds, and even if it were not so, that he gave such bonds as were not objected to by the trustees, but were by them considered as sufficient, as is apparent from the circumstance that they did not consider the office vacant, and did not notify him that anything further was required of him, the court of common pleas erred in rejecting the evidence offered by him to prove that the act complained of was done under and by virtue of a warrant directed to him as a constable. For this error the judgment of that court, so far as it respects Barret, must be reversed, while it is affirmed as to the other two defendants in the original suit.

The opinion of the court upon this question renders it unnecessary to examine the other errors assigned in the case.†

†NOTE BY THE EDITOR.—Constable's official character is provable by general reputation. The first point made in the above case settled affirmatively, iii. 94. So of a tax collector, v. 215. As to bond of constable, see also v. 136.

McArthur v. Phœbus, etc.

D. McARTHUR v. PHŒBUS, THOMAS, AND OTHERS.

An invalid entry may obtain sufficient notoriety, and subsequently become a good location call.

Complainant having obtained a patent, as assignee, is not bound to prove his purchase from the assignor.

Doctrine of notice has no application between claimants of conflicting titles

The plea of innocent purchaser can not protect the purchaser of a title originally defective against a better adverse title.

An entry can not be made valid by subsequent notoriety.

Entry originally void because of the disproportion between its length and breadth, may be rendered valid by withdrawal of part, so as to give it the relative proportions.

Matters not put in issue by the pleadings are not to be investigated. But allegations on one side, not admitted or denied on the other, are considered in issue, and may be proven.

Proof as to notoriety of entry.

Entry defective for want of notoriety.

THIS was a bill in chancery between conflicting claimants of land upon distinct entries, surveys, and grants. It was adjourned from Madison county, and was elaborately argued by Scott and Doddridge for the complainant, and Douglass, and Brush and Fitzgerald, for the defendants. As the case is fully stated, and the arguments of counsel noticed and recapitulated, in the opinion of the court, the report is confined to that opinion.

416] *Opinion of the court, by Judge BURNET:

The complainant claims under an entry in the name of Robert Means, made May 23, 1808, in the following words: Robert Means, assignee, enters two thousand six hundred and sixty-six and two-thirds acres of land, on military warrant No. 5,387, on the waters of Deer creek, beginning at three elms, southeasterly corner to Baron Steuben's survey, No. 2,698, running north thirty, east two hundred and ninety-six poles, etc. On the margin of this entry is the following memorandum: fifteen hundred acres withdrawn from the northeast end (entered 147).

This entry was surveyed June 14, 1809, recorded August 12,

McArthur v. Phœbus, etc.

1811. Patent obtained October 7, 1812, in the name of complainant, assignee, etc.

Steuben's survey, No. 2,698, was made June 30, 1796, and in the following words: Surveyed for Major General Steuben eleven hundred and fifty acres of land, on part of military warrant No. 104, on the northwest of the Ohio, and on Deer creek, a branch of the Scioto, beginning at an ash, a white oak, and a maple, north-east corner to James Innis' survey, No. 1,727, running with Innis' line, south twenty, west four hundred poles, crossing Deer creek, at one hundred and eight poles to a stake, southeast corner to Innis', thence south twenty-one, east three hundred and seventy-four poles to three small , thence north sixty-nine, east three hundred and twenty poles, crossing the creek at sixteen poles, to three elms, thence north eighteen, west six hundred and seventy poles to a stake, thence south sixty-nine, west eighty-four poles to the beginning.

The survey of James Innis was made on the same day (June 30, 1796), and calls for Deer creek.

The defendants, Doolittle and Thomas, claim under an entry in the name of Thomas Chilton, made on April 27, 1807, in the words following: Thomas Chilton, heir at law to John Chilton, deceased, enters five hundred and forty-one acres of land, on part of military warrant No. 1,249, on the waters of Deer creek, a branch of the Scioto river, on a branch emptying in on the upper side, by some called Opossum, and by others called Plum run, beginning, by survey made, at three elms and a *large white oak, running south [417 nineteen, west twenty poles, south sixty, west forty poles, to three pin oaks, marked as a corner, north thirty, west one hundred and sixty poles, north sixty, east forty-four poles, north two hundred and ten, east two hundred and sixty, south thirty, east sixty-two, south fifty-seven, east one hundred and twenty, south forty-five, west one hundred and forty-five, thence, and from the beginning, south seventy, west for quantity. This entry was surveyed August 30, 1810, and a patent was granted to Doolittle, July 27, 1812.

The defendants, Dunlap, McHenry, Phœbus, and Senate, claim, under an entry in the name of John Stokes, made November 8, 1807, in the following words: John Stokes enters four hundred acres of land on part of warrant No. 1,390, on Opossum or Plum run, a branch of Deer creek, beginning on the run, where the

McArthur v. Phœbus, etc.

- lower line of Thomas Chilton's entry crosses the same, running down the run, with the meanders thereof, four hundred and eighty poles, when reduced to a straight line, thence, and from the beginning, at right angles to the general course of the run, on each side, to include an equal quantity on each side, by parallel lines, to the general course thereof. This entry was surveyed December 10, 1811, recorded January 1, 1812, and patented April 8, 1812.

As the defendants have the first entries, and are in possession under the oldest patents, they may protect themselves by showing the sufficiency and legality of their own locations, or the insufficiency and illegality of the location, under which the complainant holds. If they have succeeded in establishing either of these propositions, or if the complainant has failed in sustaining the validity of Means' entry, he is not entitled to a decree. But before I proceed to examine the evidence which has a direct bearing on those points, it will be proper to notice some collateral questions, which have been discussed by counsel in the course of the argument.

1. It is alleged, on the part of the defendants, that there is no proof of the entries and surveys mentioned in the pleadings, or that Steuben's survey is numbered 2,698.

This objection does not appear to be true in point of fact, and probably would not have been taken, if the connection of entries and surveys, from the records in Col. Anderson's office, had been [418] carefully inspected. In the voluminous file *of papers appertaining to the cause, this document must have been overlooked, because it contains certified copies of all the entries and surveys referred to in the pleadings, and was received as evidence without objection. It does not appear on what ground this exception was taken. If it be predicated on a supposed defect, or informality in the mode of authentication, the objection comes too late. The document was received as evidence—the defendant took no exception to it at the time—the complainant has relied on it, and it would be a mischievous precedent to permit an objection to be taken at this stage of the proceedings.

2. It is urged that Steuben's entry and survey depend on Innis' entry and survey, the situation of which is not shown.

This objection would have some weight, if the complainant could be required to show that Steuben's entry was precise and certain, at the time it was made. This, however, is not the case.

McArthur v. Phœbus, etc.

It is immaterial to him, whether that location can be sustained or not, because a survey of a void entry may be a good special call in a subsequent entry, if the survey called for has obtained general notoriety before the entry calling for it is made. This being the settled principle, the complainant is not required to show the situation of Innis' entry nor survey. He may safely admit that Innis has neither entry nor survey, and that Steuben's entry had neither certainty nor precision, at the time it was made. The reason why Steuben's survey is a good call, if it shall be found to be such, is, that it had become an object of notoriety, and on that account, might be readily found by a subsequent locator; and that when found, it would, by reasonable attention, lead an inquirer to the beginning of the entry calling for it. A burning spring, if generally known, would be a good call, not because it had become a valid landmark to a former location, but because it would enable a subsequent locator to find the entry calling for it. On the same principle, if Steuben's survey, at the date of Means' entry, had become an object of general notoriety, it was a good call on that account, whether the entry of Steuben was a valid appropriation of the land or not. Steuben may have lost his land for want of precision and certainty *in his call, and yet [419 Means, by calling for Steuben's survey, may secure his land, on the ground that his call was sufficiently certain, precise, and notorious to identify the land intended to be appropriated, and to enable subsequent locators easily to find it.

3. The next objection is, that the complainant has not shown his right to the entry of R. Means.

To this it may be replied: 1. That the assignment of the entry to the complainant is averred in the bill, and impliedly admitted in some of the answers, if not in all. 2. That a patent having regularly issued to the complainant, as assignee of R. Means, is *prima facie* evidence that the assignment was legally made, and must be considered as conclusive on that point, until the contrary is proved, at least as to third persons, who have no pretense of claim under the assignor, nor any interest in vindicating his rights. The complainant must have produced an assignment of the plat and certificate, or the patent could not have issued in his name. If that assignment was improperly obtained, the original proprietor, or those claiming under him, are at liberty to impeach it. But if this objection be entitled to any weight, it applies with

McArthur v. Phœbus, etc.

equal force to the defendants. Doolittle and Thomas claim by assignment from Thomas Chilton, who is said to be heir at law to John Chilton, the original owner of the warrant. But no evidence, other than the recital of the patent, is produced to show, either the heirship of Thomas Chilton, or the transfer from him to the defendants. Strictly speaking, this is a question between the complainant and Means, in which the defendants have no concern.

4. It is alleged that complainant had personal notice of the defendants' entries before he made the entry in the name of Means. The evidence on this subject is that he had notice of those entries in 1809, about the time he surveyed for Means, which was more than a year after the entry. His notice, however, may safely be admitted, to the extent claimed.

It was decided by this court, in *Kerr v. Mack*, 1 Ohio, 161, that the common doctrine of notice does not apply to cases under the 420] land laws of Virginia, when the parties *claim under distinct entries. Every claimant must rest on the validity of his own location. If that be illegal and void, it does not appropriate the land; and any holder of a warrant may locate the same tract, notwithstanding he has full knowledge of the former illegal entry. Notice can not make that valid, which is void in itself; nor can a legal location be rendered void by a notice, that a prior illegal entry had been made on the same land. This doctrine will be found also in *Craig v. Pelham*, Printed Decisions, 287; *Wilson v. Mason*, 1 Cranch, 100.

5. It is urged that these defendants are innocent purchasers, without notice.

The same plea might be advanced in favor of every person who may be so unfortunate as to purchase a bad title; but ignorance, or want of care, can not destroy the rights of others.

If the contending parties in this suit had purchased from the same individual, and the defendants, under the junior contract, had obtained the legal title for a valuable consideration, and without notice of the elder contract, they would have been protected, but such is not their situation. They have purchased the title of Chilton and Stokes—the complainant has purchased the title of Means; and the only inquiry is, which is the better title. If they have been so unfortunate as to purchase from a person without title, a knowledge of that fact can not prevent others from pur-

chasing from the real owner. This objection is fairly met by the maxim, *caveat emptor*. In *Taylor v. Brown*, 5 Cranch, 235, it was decided that a subsequent locator, without notice of a prior location, can not protect himself by obtaining the elder patent.

6. The next objection is, that in May, 1808, Chilton's entry had become as notorious as Means'—that the equity of the parties was, therefore, equal, and that the law must prevail.

It was decided by this court, in *Kerr v. Mack*, in conformity with the current of decisions in Kentucky, and in the Supreme Court of the United States, that an entry can not be aided by "after-acquired notoriety." In the face of that decision, the court did not expect to have the question agitated. It is evident that without the aid of *that description of notoriety, the doctrine of equal equities can have no place in this discussion. The entry of Chilton must be considered as it was on the day it was made; consequently, if it has any equity, it must be older and superior to that of the complainant. The equities can not be equal.

7. It is said that a call to adjoin an *entry*, requires that all the locative calls of that entry be shown, for which 3 Bibb, 536, is cited. The principle, however, has no application to the complainant, who calls for Steuben's *survey*, and not for his entry, but it applies in all its force to the defendants, who claim under Stokes, whose entry calls for, and depends wholly on the *entry* of Chilton. It can not be useful, therefore, to pursue this part of the subject further, unless it shall be found necessary to do so hereafter, in considering and deciding on the validity of Stokes' entry.

8. Another objection is that the original entry of Means was void, because its length compared with its breadth exceeded the proportion allowed by statute.

If this objection has not been obviated by the amendment of the entry, made by the withdrawal of the fifteen hundred acres, it would seem to be fatal to the complainant's claim. The statutes under which these warrants were located (Swan's Collection of Land Laws, 122), requires the breadth of each survey to be at least one-third of its length in every part, unless when such breadth shall be restrained on both sides by mountains, water-courses, or former locations. The calls of the entry show that this proportion has not been observed and it is not pretended that the obstacles provided for exist. The question then is, has the withdrawal of the fifteen hundred acres removed this difficulty. This

McArthur v. Phœbus, etc.

question admits of but one answer. If the withdrawal has not destroyed the validity of the entry, as the defendants' counsel contend, it has obviated the difficulty, because the survey that has been made on the residue of the entry, and on which the patent issued, is clearly conformable to the requirements of the statute in this respect.

The question then presents itself, has the withdrawal vitiated 422] the original entry? There is no doubt but that *locators have a right to amend their entries, or to withdraw them in whole or in part. The rule on this subject seems to be, that the withdrawal of part of an entry will not destroy the validity of that entry as to the residue, provided it be so made as to leave the residue possessed of the certainty and precision required to constitute a good original entry. *Sprigg v. Ogden*, Marsh. 612. In *Preeble v. Vanhousen*, 2 Bibb, 121, it is laid down that after a withdrawal the remaining part of the entry should be considered as having the calls of the original entry, and if, with those calls, it would be good as an original location it ought to be sustained. Tested by this rule the withdrawal does not injure the entry, because the calls of the original entry being saved, the residue is certain both as to quantity and situation, and can be ascertained with the same ease and precision as the entire entry could have been ascertained before the withdrawal; hence it follows that if the first entry was good as to its calls, the residue, as an entry, is also good. There is no weight in the argument drawn from the fact that the withdrawal throws the complainant entirely from Steuben's southeast corner, and consequently from his own beginning corner, because having a right to refer to the corner as one of the locative calls of his entry, it affords the means of ascertaining and fixing his beginning with absolute certainty. "That is certain which can be rendered certain." The amount of the argument is, that a withdrawal can not be made of that part of an entry which includes its beginning, because it must always throw the location at a distance from its original beginning; but we think there is nothing in the objection. The beginning of the first entry may, by a withdrawal, be converted into a call, pointing out the beginning of the residue of that entry.

On the part of the complainant, it is insisted that the certainty and notoriety of Means' entry have not been put in issue, and that proof should not be required to establish them, nor admitted to

McArthur v. Phœbus, etc.

controvert them. It is true that the bill avers the entry of Means to be good, certain, legal, and valid when made, and the answers neither admit nor expressly deny the averment, though some of the defendants state their ignorance of the facts relating to Means' entry.

*The complainant attempts to sustain this ground on the [423 case of *James v. McKennon*, 6 Johns. 543. The rule settled in that case is one which has been generally observed in this court, viz: That evidence ought not to be received of a matter not put in issue. But the important question arising here is, when shall a matter be said to be in issue? The complainant has taken it for granted that the sufficiency of his entry is not in issue, but the authority on which he relies does not sustain him. In that case the bill alleged that defendants had possessed themselves of property to which complainants were entitled, and prayed that it might be decreed to them. One of the defendants in his answer set up a contract, under which he claimed a right to the property. The replication was general. The defendant proved the contract; the complainant offered evidence to impeach it on the ground of fraud. It was decided that he could not do so, because he had not alleged fraud in his bill or replication, and therefore the fact of fraud was not in issue. Here, it will be remarked, that the contract was not noticed either in bill or replication.

It was averred in the answer, and that averment was considered as putting it in issue. The silence of the complainant was not taken as an admission, but proof was *required*. The evidence of *fraud* was rejected because it was *nowhere* alleged in the pleadings. But from the course of reasoning it is evident, if an averment of fraud as to the contract had been found in any part of the pleadings, the evidence would not have been rejected. It has been the constant practice of this court to consider any fact that is distinctly averred in the pleadings, if it be relevant to the matter in controversy, as being in issue, and susceptible of proof. If any material averment in the bill be not answered by the defendant, the complainant has his election to except and require a further answer, or to proceed and take on himself the risk of sustaining the matter by testimony, and this is sometimes the wiser course, as requiring less evidence than is necessary after the defendant is driven to a denial. It has been decided in the court of appeals of Kentucky, that if a bill charges the matter *to be within the knowl-*

McArthur v. Phœbus, etc.

edge of the defendant, and the answer is silent as to the matter so 424] charged, it *will be taken to be admitted, but *if not so charged*, an omission to answer does not admit it. *Moore v. Docket*, 2 Bibb, 69; *Kennedy v. Meredith*, 3 Bibb, 465; *Cowan v. Price*, 1 Bibb, 173. It was decided in *Oldham v. Bowen*, 3 Bibb, 539, that a fact charged in a bill and not admitted by the answer, either expressly or by implication, must be proved at the hearing. And in *Young v. Grundy*, 6 Cranch, 51, it was decided that allegations in a bill, neither admitted nor denied by the answer, must be proved at the hearing. Our practice is in conformity with this rule, and requires the averment, in relation to the sufficiency of Means' entry, to be sustained by proof, though the answers are silent on that point, nor does this requirement interfere with the rule relied on by the complainant, that the *allegata et probata* must agree.

Having disposed of these questions, we are next to examine and consider the locations on which the parties severally rely.

The defendants being in possession under the oldest grant, the complainant can not disturb them without showing in himself the commencement of a good title anterior to their surveys. To effect this three points are to be made out:

1. That Means' survey was precise and certain at its date.
2. That the entries of Chilton and Stokes were uncertain and insufficient.
3. That Means' entry was made before the entries of Chilton and Stokes were surveyed.

The calls of Means' entry are for Deer creek and the southeasterly corner of Baron Steuben's survey, number two thousand six hundred and ninety-eight. It is admitted that Deer creek was generally known in May, 1808, and was therefore a good general call, and it seems to be conceded that Steuben's entry did not possess the certainty and precision necessary to constitute a valid location at the time it was made. It is sufficient, however, for the complainant's purpose, if he has succeeded in showing that the survey of Steuben had acquired general notoriety on May 23, 1808, when the entry of Means was made. To ascertain this point, it is 425] necessary to examine the testimony. *1. It appears that the survey of Steuben had been made about twelve years before the entry of Means. That Churchill Jones had called for it in his survey, and that Jones' survey was improved and settled by at least three persons before and at the time when the entry of Means

McArthur v. Phœbus, etc.

was made. These circumstances afford a presumption in favor of the notoriety of that survey. In addition to this, its notoriety is proved by a number of witnesses, six of them being experienced surveyors, prior to the date of Means' entry.

Isaac Minor settled in the neighborhood in February, 1802; shortly after, he was informed of Steuben's survey (2,698). It appeared notorious. Many persons were residing in the neighborhood. The adjoining survey had been cut up into small farms, and settled before the date of Means' entry. He believes that an inquirer on Deer creek would have been directed to Steuben's survey. Bell's survey, and Baylor's survey, immediately below, on the creek, were also settled and improved before the entry of Means was made.

Henry Ward was on Steuben's survey in 1802, in 1804, and in January, 1807. He states the names of about fifteen persons who were settled in the immediate vicinity of Steuben's survey, in 1807. That it was known to the settlers generally, and was notorious as early as the spring of 1807. He had been, at different times, with the surveying parties of Evans, Rector, Langham, Massie, and O'Bannon, to all of whom Steuben's survey was known.

John Harrison first went on to Deercreek in 1806, and settled in the neighborhood of Steuben's survey. He gives the names of about twenty persons settled in the vicinity of that survey, before the date of Means' entry. He thinks it would have been found by an inquirer as early as May, 1808.

Patrick McLain knew Steuben's survey as early as May, 1808.

John Fallon knew the survey in 1807. Thinks a locator, by proper diligence, would have found it at that time. That it was notorious, and generally known to surveyors, locators, and others, as early as 1807, at which time, many persons were residing near it.

*Jesse Spencer was acquainted with Steuben's survey in [426 1800. He thinks that a locator, in 1807, with proper diligence, could have found it. He believes that survey was notorious, and generally known to surveyors, locators, and others as early as 1807.

John Evans was acquainted with Steuben's survey in 1807. The southeast corner was then standing. He believes that any locator, by proper diligence, could have found it in 1807. In January, 1808, he thinks it was generally known to the inhabitants of the neighborhood. In January, 1807, he could have found it without difficulty.

McArthur v. Phœbus, etc.

Jeremiah Minor removed to the neighborhood of Steuben's survey in 1808. Heard it then spoken of by the neighbors as generally known. Thinks anybody could have found it; and that it was as well known in the neighborhood as the creek itself.

John Eckford knew the survey of Steuben in 1807; heard Langham and other persons speak of it as early as that time.

E. Langham has known Steuben's survey since 1801. It was then so notorious that he found it very easily from the information of others. The beginning corner was notorious to himself, and the locators and surveyors, as early as 1807.

N. Massie knew the chain of old surveys on Deer creek, including Steuben's, long before 1807. He thinks any locator, with that connection and reasonable diligence, could have found Steuben's survey before 1807.

James Gallaway, Jr., thinks there would have been no difficulty in finding Steuben's survey in 1807. He had occasion to search for it in June, 1809, when he found it without difficulty.

F. Graham, W. Wilson, and J. Freeman identify the survey, and the elm on the southeast corner called for by Means.

The defendants have introduced a number of witnesses, who testify that Steuben's survey was not known to them at periods subsequent to the location of Means. We admit the principle, that negative testimony is entitled to its full weight on questions of notoriety, for reasons which it is not necessary now to detail, provided the opposing witnesses have equal advantages of information; but we are decidedly of the opinion that the negative testimony in this case can not preponderate. The witnesses by whom it was proven have not had the same opportunities of acquiring information on the subject as those who testified in the affirmative. Several of them have a direct interest in the suit. Some of them resided in a more remote settlement. A portion of them appear to be industrious, domestic men, who have paid little, if any, attention to entries or surveys. Some have recently moved to the settlement; others never heard of Steuben's survey till the commencement of the present suit; though it is admitted by all that if that survey was not notorious before, it became so shortly after the location of Means. The affirmative witnesses, generally, are the most intelligent, and those of them who live in the neighborhood reside nearer to the survey, and

more immediately on the creek, and would be most likely to be called on for information by subsequent locators.

It is not necessary to consume time, by commenting particularly on the complainant's testimony, which is very full and precise. We are, on the whole, perfectly satisfied, that the notoriety of Stueben's survey, at the date of Means' entry, is sufficiently established.

Chilton's entry calls to begin at three elms, and a large white oak, on the waters of Deer creek, on a branch emptying in on the upper side, by some called Opossum run, and by others, Plum run. Stokes' entry calls for Opossum run, and the lower line of Chilton's entry.

Testimony was introduced for the purpose of proving that Opossum run was notorious, when Chilton's survey was made, and that Chilton's location had acquired general notoriety before Stokes' entry was made, but it is very apparent that the testimony does not establish either point. Langham, who made these entries, says that they were made before there was any settlement on the run, and that the run became notorious after the settlements were made; of course it was notorious when the entries were made. But if the defendants had succeeded in proving the notoriety of that run, it would not sustain the entry. The creek, it appears, was two miles in length, and the valley through which it runs about two miles in width. A subsequent locator *was, [428 therefore, subjected to the necessity of searching the whole extent of that valley, to find the marked trees called for. This, we think, was unreasonable, and imposed a duty that the law does not authorize. The entry of Chilton is destitute of the precision and certainty which is required to constitute a valid location. The witnesses who were examined to sustain both of these entries, refer to periods subsequent to their date, and in addition to this, they state, that the entry claimed by Chilton, was known by the name of Langham's entry, or that the two together were known as Langham's and Doolittle's eight hundred acre tract. They never heard them spoken of as the entries of Chilton and Stokes, until after the date of Means' entry. When Stokes entered, Chilton's entry, if it had any notoriety, which is, to say the least, very doubtful, was known by the name of Langham's entry, which circumstance was calculated to confuse and deceive rather than to aid subsequent locators.

A careful examination of the whole testimony, relating to these entries, leads to the following results: That Opossum run, the only important call in the first entry, did not acquire notoriety till after that entry was made, and that if it had been notorious it was not a good locative call. That at the time Stokes entered, Chilton's entry was not generally known. That as far as it was known it was called Langham's entry, and that the lower line of that entry, called for by Stokes, was an open line, and could not be found without ascertaining the precise situation of every part of the entry. Much of the defendants' argument, in relation to Stokes' entry, is predicated on the assumed fact, that Chilton's entry had been surveyed before the entry of Stokes was made; this, however, as has been shown, was not the case. But if it should be admitted that Langham had made a survey, as contended, it was unofficial, and not recorded, nor was it called for by Stokes. He calls for the lower line of Chilton's entry, which line was run in 1810. Till that period, there was no such line in existence, and yet it is relied on as an object of notoriety to sustain an entry in 1807, about three years before it was run. The age of this line, and consequently of the survey, is also ascertained by the 429] blocks *taken, and returned by the surveyor, from which it appears to have been marked in 1810 or 1811. Were it necessary to pursue this part of the case any farther, reference might be had to the discrepancy between the objects described in the entry of Chilton, and those actually found on the ground, and to the situation of Stokes' entry, as it has been surveyed, which appears, from the diagram before us, not to touch any line or point in the entry or survey of Chilton.

The next and last point to be disposed of, is the date of the defendants' surveys.

It is contended that their entries were actually surveyed before the date of Means' entry; and that they are, therefore, protected by the act of Congress of March, 1807.

This objection is positively contradicted by the record evidence before us. The survey of Chilton's entry was made by N. Massie, on August 30, 1810, and that of Stokes was made on December 10, 1811, as appears from the records in Col. Anderson's office, certified copies of which are on the file of papers in this case. The entry of Means was made in May, 1808, and surveyed in June, 1809. But the defendants seem to rely on a supposed survey, made

McArthur v. Phœbus, etc.

by Langham, about the date of the entry. To this it may be replied, in the first place, that there is no conclusive evidence of such a survey. The witnesses say something of Langham's surveying, but none of them state that he made a regular survey of the whole entry; and the notes taken by him at the time are strongly presumptive that he did not. They show that the lines and corners, generally, were not marked. But if he had made a complete survey at that time, it would not alter the case.

1. Because he was not a deputy, and had no authority to survey.

2. Because there is no such survey recorded.

3. Because the defendants, or those under whom they claim, have relied on the survey of Massie, and made it their own, by recording it, and making it the basis of their legal title.

If that be not their survey, the patent has improperly issued. Admitting that Langham had made private *surveys of [430 these entries in 1807, and Massie, relying on his correctness, and to save himself trouble, adopted and certified them as his own in 1810 and 1811, they certainly received all their validity by that adoption, and could operate as surveys only from that time.

The position taken by the defendants goes to destroy the distinction between the acts of authorized and unauthorized surveyors, which is inadmissible. An official survey is an indispensable link in the chain of title. Such a survey can not be made by a person who has not been legally appointed and qualified, for reasons that are too obvious to be questioned. Every person concerned in the transaction, whether as surveyor, marker, or chain carrier, must be appointed and sworn as the law directs.

From this view of the subject, the complainant is entitled to a decree for such of the land claimed by the defendants as is covered by his amended entry, and the survey in pursuance of it.

Greene v. Dodge and Coggswell.

DANIEL GREENE v. J. DODGE AND ELI COGGSWELL.

Declaration upon an indorsement of a promissory note, guarantying payment by the maker of the note, must aver the consideration upon which such indorsement is made.

The guarantors of payment of a promissory note can not be charged unless payment be demanded of the maker when due, and notice of non-payment be given to the guarantors.

THIS case was adjourned for decision here, by the Supreme Court of Washington county, and was heard and decided upon an agreed state of facts.

Sidney Dodge was indebted to the plaintiff upon his own private account, for which he gave to the plaintiff a note, payable at a day future. Upon this note the defendants indorsed their names in blank. This indorsement was made without any consideration from the indorsers to the payee; and at a subsequent period the following was written over it: "We, the undersigned, bind ourselves as security for Sidney Dodge, for the payment of the within note, according to the tenor and effect thereof, to Daniel Greene, the obligee in said note." The plaintiff had prosecuted a suit against Sidney Dodge to judgment and execution, who had no property from which the judgment could be satisfied.

431] *The declaration was special upon the guaranty, charging that it was made for value received, but setting out no other consideration; and it alleged a breach in the non-payment of the note, but without averring any demand upon the payers upon the day the note fell due, or notice of non-payment to the indorsers.

Several points were made and argued by counsel, but as the court decided the cause upon two only of those points, it is deemed unnecessary to notice the others, in reporting the case.

ARIUS NYE, for defendant:

The plaintiff is not entitled to *judgment*: 1. Because the *declaration* states no *consideration* for the promise of the defendants; 2. That it contains no proper averments of a *demand* upon Sidney Dodge, and *notice* to the defendants of non-payment by him; or of excuse for the omission of such demand and notice. These objections apply equally to both counts.

1. "Every part of the entire consideration for any promise con-

 Greene v. Dodge and Cogswell.

tained in the agreement, must be stated in the declaration." 1 Selw. N. P. 90; Clark v. Gray, 6 East, 519.

"The statute of frauds has made no alteration in the common law requisites, by superadding a further constituent of the validity of a promise under certain circumstances; and as appears from a multitude of authorities, those collateral promises were *nuda pacta*, before the statute, unless they were supported by a consideration, *which consideration*, it was also necessary to *set forth in the pleadings*." Rob. 208, and see Id. 204; Forth v. Stanton, 1 Saund. 210, and note 2; Barber v. Fox, 2 Saund, 136. The note to Forth v. Stanton is very explicit to this point. It is there said, "so with respect to promises to answer for the debt, etc., of another, or collateral promises as they are generally called, there must be a sufficient *consideration*, such as forbearance, etc., *alleged in the declaration*, otherwise they also are not binding, though reduced into *writing*; as where A. has sold and delivered goods to B. and C. afterward promises A in writing to pay for them, this promise is a mere *nudum pactum*, and void. 1 Saund. 211, a.

*It is not necessary, in a declaration upon a collateral [432] promise, to show that the promise was *in writing*; but it is necessary to set forth therein a sufficient consideration for the promise; without which the declaration is unquestionably bad.

The counts in this case state notes made by Sidney Dodge, whereby *he* (in the singular) promised to pay the plaintiff (without negotiable words), certain sums, for value received; and that the defendants indorsed their names upon the back of the notes as securities for the payment by Sidney Dodge, as is the necessary inference; not stating that the defendants made *their* note, or notes, or that *they* promised to pay to the plaintiff the debt of said Sidney, in consideration of any benefit received from the plaintiff by them; or granted to him *at their request*; or the forbearance, or release, of any right by him *at their request*.

Here no consideration for the undertaking of the defendants, as stated, is expressed or implied, *vide* Robertson, 117, quoted above. The defendants are not stated to be, directly, parties to the notes. The words "for value received," in the promise of Sidney Dodge, purport, *prima facie*, a consideration already *executed* and *passed to him*; but the indorsement, as stated, is no acknowledgment of value received by the defendants: indeed, it directly excludes that inference. By these words, in a bill, it has been said (Grant v.

 Greene v. Dodge and Cogswell.

Dancesta, 3 M. & S. 351): "That the drawer informs the drawee that he draws on him in favor of the payee because he has received value of such payee." *Debt* would not lie on the undertaking of the defendants here stated, it being a collateral engagement for the debt of another; Chitty on Bills, 545, ed. 1821; 2 Ld. Raym. 1040; Holsden v. Horridge, 2 Saund. 62, 65, there cited; though it would lie on the note against the maker, S. Dodge. *That* would be *evidence* against him on the money counts, in an action by the payee, the plaintiff here; but would it be so on the like counts against them? It is believed not. Why? Because they do not undertake originally, and directly, as does the maker, but collaterally; they do not acknowledge the receipt of value; the *duty* is not theirs. What consideration, then, is here shown for their 433] promise? The *promise* raises no consideration; and that B. owes a debt to A. is no consideration for the promise of C. to pay it. Such a promise, though in writing, it need hardly be repeated is void. Be it asked, "may not an action be sustained on a *collateral* undertaking, though *debt* or an *indebitatus* can not? It may; but, it is especially to be noted, that it is *only* by force of one or the other of *two* circumstances: The undertaking must, in form and effect, come within the *exception* recognized by the law merchant *purporting* thereby a consideration; or, as subject to the *general law* respecting *parol* agreements, a consideration for, and as a necessary *part* of the collateral *agreement*, *must be distinctly and specifically shown*. This distinction has, it is respectfully submitted, been already established. Neither of these circumstances appears here. The clear result, therefore, seems to be, that the counts in this declaration are substantially defective, in that they state no consideration for the alleged promise of the defendants. It only remains, here, to observe that a remark of Judge Kent, in *Leonard v. Vredenburg*, upon the consideration to the principal debtor, was upon the motion for a *new trial*, and distinctively applied by him to the *facts as offered* in evidence.

2. That which it is necessary distinctly to prove, in the first instance, to sustain the action, must be specially averred. The plaintiff's declaration is also defective in the absence of the proper averments, that payment of the notes was demanded of the maker when they became due, and notice of non-payment given, in proper time, to the defendant. Nor are there any averments of facts which might excuse the omission. The undertaking of the

Greene v. Dodge and Cogswell.

defendants, if their act *be* such, was, as has been shown, collateral; *if effective*, in law, it could only be treated as a *guaranty*. As such, they should have had notice of non-payment, on demand, by Sidney Dodge. The *plaintiff* has treated the promises as *conditional*; he has only alleged the *liability* of the defendants as accruing by a means of judgment and execution against the maker, Sidney Dodge, and their promise thereupon. The reasons which require notice to the *indorser* of a note, of a demand upon and the non-payment, by the maker, apply to a guarantor. He *should*, by seasonable notice, be put in a condition to [434] secure his indemnity, from the party primarily liable; and though the same strictness is not applied, the difference, were the defendants otherwise liable, is not necessary to be distinguished here. As to the necessity of the averments of demand, etc., see *Chitty on Bills*, 264, 544, 633; *Nicholson v. Gouthit*, 2 H. Black. 609; *Philips v. Astling*, 2 Taunt. 206; 3 Wheat. 154, note.

In conclusion, it may be added that plaintiff, having treated the undertaking of the defendants as conditional and contingent, depending on the failure of Sidney Dodge to *pay*, he has not by the manner in which he has declared, shown a *liability* of the defendants; for though he alleges, that, by means of the judgment and certain executions, the defendants (long after the notes became due) *became liable* to pay, "according to the tenor and effect of the said note," and that they promised to pay accordingly; yet it is nowhere averred that Sidney Dodge did not *pay*, or had not *paid*, the money mentioned in the note; and it is not averred that they became liable upon the indorsement as stated. If they did not become liable at once (and the plaintiff has not supposed that they did), by indorsing their names as stated, they could only become so by the happening of some *contingency*, as the *non-payment* by Sidney Dodge, when the notes became due; that non-payment, then, independent of the objection for want of notice, should have been *directly* averred; and not by an *inconclusive inference*. As to *these* parties the judgment is not conclusive of that fact. That did not make *them* liable if they were not liable before; and the averment of their liability is not a logical conclusion from the facts stated as its consummation. And though it be held that it is not necessary, in a declaration upon a note, to aver a liability as accruing upon the *making* of the note, and by force of the statute, and stating a promise to pay, in consideration of that

Greene v. Dodge and Coggswell.

liability (which is the more logical mode), yet the other mode of declaring simply upon the express promise, can only be applied to a promise which is *original* and *direct*. The liability accruing upon a *conditional* or *contingent* undertaking must be correctly stated, according to the inceptive engagement and the legal effect 435] *upon the happening of that contingency, which, in law, *fixes* the liability of the party—making that certain which was before contingent; and the *promise* which is implied thereupon, as the legal consequence, must be expressed in accordance with the occasion and the fact of the liability thus stated. The counts of the declaration in this case, are, therefore, it is conceived, uncertain, inconclusive, and insufficient; so that, were the facts stated in them found to be true, they would not establish any liability in law, on which judgment could properly be rendered for the plaintiff against the present defendants.

Mr. GODDARD submitted an argument on the same side—substantially maintaining the same points, upon the same authorities and arguments.

MAYBERRY and EWING, for plaintiff:

1. The undertaking written above the signature of the defendants, by the holder, being in accordance with the authority given him by such blank signatures, has relation to the time of the signature itself, and is the same in its legal effect, as if it had been written by the defendants, at the time of writing their names, before the delivery of the instrument.

If, then, it should be conceded, that in order to take a collateral undertaking out of the statute of frauds, it is necessary to express by the note, in writing, not only the promise itself, but also the consideration of such promise, as in the case of *Wain v. Walters*, 5 E. 10. Yet this case does not come within the operation of that rule. For, here, the guarantee is a part of the original instrument; it was made with the note, and received with it, and the "value received" in the body of the note, applies equally to, and forms part of the defendant's undertaking.

It is precisely, in legal effect, as if the defendants had signed their names on the face of the instrument, below that of the maker, and added, "as security." Their contract would not, in that case, be a nude pact. It is clearly supported by the consideration of the

Greene v. Dodge and Cogswell.

note, although it might not be so if after the delivery of the note, such contract *of securityship were entered into. In Leon- [436
ard v. Vandeburgh, 8 Johns. 40, Chief Justice Kent says: "To say that the promise is void, for want of disclosing a consideration, is assuming what the plaintiff offered to show ought not to be assumed, for there was no distinct consideration passing between the plaintiff and defendant. Johnson's note given for value received, and of course importing a consideration on its face, was all the consideration required to be shown. The paper disclosed that the defendant guaranteed the debt of Johnson, and if it was all one transaction, the *value received* was evidence of a consideration, embracing both promises. The writing imported, upon the face of it, one original and entire transaction; for a guarantee of a contract, implies, *ex. vi. termini*, that it was a concurrent act, and part of the original agreement." "The defendant guaranteed payment of the *value received*." The case of Hunt, administrator, etc. v. Adams, 5 Mass. 358, is exactly in point. Joseph Chaplin gave his note to Isaac Burnet for one thousand five hundred dollars, on which note the defendant wrote the following guarantee: "I acknowledge myself holden as security for the payment of the demand of the above note. Witness my hand: Barnabas Adams." The question agitated was, whether there could be a recovery on the paper itself, without further evidence. Chief Justice Parsons, in delivering the opinion of the court, says: The defendant is an original party to the contract, as well as Chaplin. The contract, in its legal construction, is a promise, as well by the defendant as by Chaplin, for value received, to pay one thousand five hundred dollars to plaintiff's intestate. In the case of Adams v. Bean, 12 Mass. 139, which was an assumpsit on a guarantee, written on the back of a lease, that the lessors would perform, Chief Justice Parker, after denying the law of the case of Wain v. Warlters, adds (supposing it to be law): "We think a written agreement, on the back of a lease, that the parties to it should perform their undertaking, sufficiently expresses the consideration; for it may, and ought to be presumed, that the lease would not have been obtained without such guarantee; and the permitting to occupy, in consideration of the promise in writing, of another to pay the rent is, we *think, sufficient to raise a consideration of the [437
promise." In the case at bar, we conceive that the evidence of a consideration, apparent on the note, is not at all lessened by the

Greene v. Dodge and Cogswell.

matter admitted by the agreed case. The note, it is true, was given for a pre-existing debt; but that debt was merged in the note, or at least the right of action suspended, until the credit therein given was expired. It was a new contract which abrogated or modified the pre-existing rights of the parties.

It is unnecessary to inquire into the soundness of the doctrine laid down in the case of *Wain v. Warlters*, as it has no application in the present case. That case, however, is overruled in *Hunt, administrator, v. Adams*, 5 Mass. 558, and *Adams v. Bean*, 12 Mass. 139, and doubted in *Leonard v. Vandeburgh*, 8 Johns. 40. It is directly opposed to the principle decided in *Egerton v. Mathews*, 6 East. 307, and is denied to be law in *Minot, ex parte*, 14 Ves. 189, and much doubted in *Gordon, ex parte*, 15 Ves. 286.

2. It remains to be inquired whether a demand and notice were, in this case, necessary to charge the guarantor on his contract of security. We contend that it was not; for the note in question, not being indorsed by the payor, has never assumed the character of a commercial instrument, and the law merchant, as to demand and notice, does not apply to it. The doctrine as to what shall be necessary to charge the collateral guarantor of a commercial instrument, is unsettled, and there is some appearance of discrepancy in the cases on that subject. It is holden in *Philips v. Astling*, 2 Taunt. 206, that a person who has guaranteed the payment of a bill of exchange, though no party to the bill, is exonerated by the neglect of the holder to make presentment, and give due notice of the dishonor of such bill. In *Worthington v. Furber*, 8 East. 242, the plaintiff had bound himself as security for the payment of a bill of exchange, by the defendant, who was the *acceptor*. Before the maturity of the bill the defendant became bankrupt, and his property delivered over to commissioners. The plaintiff paid the bill, and brought his action for money paid, as on a debt accruing after the act of bankruptcy. Furber resisted the payment of 438] the bill, on the ground that, *as no demand had been made by the holder, the guarantor was not liable, and had paid the money, in his own wrong, and it was material to the defendant to stand as debtor upon the bill (which must have been proved under the commission), rather than the guarantor, who charged him as for a subsequent debt. *Per Lord Ellenborough*: "The same strictness of proof is not necessary to charge the guarantors, as would have been necessary to support an action on the bill itself, when,

by the law merchant, a demand and refusal by the acceptors, must have been proved, in order to charge any other party on the bill; and this, notwithstanding the insolvency of the acceptors. But this is not necessary to charge guarantors who insure, as it were, the solvency of their principals, and, therefore, if the latter become bankrupt and notoriously insolvent, it is the same as if they were dead, and it is nugatory to go through the ceremony of making a demand upon them." And in the case of *Swingard v. Bowers*, 5 M. & S. 62, it was holden that a defendant, who guaranteed the payment of a bill of exchange by the acceptor, was not entitled to notice of the dishonor of the bill, he being no party thereto.

Now the doctrine to be elicited from all these cases, appears to us to be this: That the guarantor of a mercantile instrument is bound by his guarantee, unless the laches of the holder release some one of the parties to such instrument, for whom the guarantor was bound. The laches of the holder, releasing such party to the instrument, would release the guarantor; otherwise it might happen that the security, having paid the debt of his principal, could not have his recourse over against such principal, who had never been rendered liable. For it will be observed, in the case of *Philips v. Arthing*, that the case did not turn on the want of notice to the guarantor. He was discharged by the want of demand on the acceptor, which discharged the drawer and indorsers. And though the case of *Worington v. Furber* might rest on its special circumstances, yet the reasoning of the chief justice fully supports the position for which we contend. And the case of *Swingard v. Bowers* is in point. But no reason can be given why demand and notice should be required to securities on a promissory note, *not made negotiable, any more than to [439 securities on a bond or single bill. The instrument has no mercantile character; no principle of the law merchant applies to it. To charge the *maker*, nothing is necessary but nonpayment. The holder is bound to do no act. Every act in discharge is to be done by the maker. He must seek the holder if he would make the payment, and the holder is not bound to call on him to demand it. But here are securities, guarantors, for what do they bind themselves? That the principal will perform what the note binds him to do, or in his default, they will perform it for him. *His* liability depends on no contingency—theirs on but one, his failure to per-

Greene v. Dodge and Cogswell.

form; and when he fails, the right of action accrues against them. They are fixed in law, by the happening of the contingency, which they had engaged should not happen. This doctrine is supported by the case of *Hunt v. Adams*, 3 Mass. 358, and the case of *White v. Howland*, 9 Mass. 315-16, in which last case this point was expressly settled. Chief Justice Parsons on the bench.

By the COURT:

The authorities and arguments relied upon by the defendants counsel, appear to us conclusive that the declaration ought to aver some legal and valid consideration, for the promise upon which it is sought to charge the defendants. The mere fact of writing their names upon the note would not subject the defendants. To charge them, it must have been done upon some description of contract with the plaintiff, by which the defendants might gain or the plaintiff might be prejudiced. And that contract, whatever it was, ought to be substantially set out in the declaration. This is not done, and, for that reason, the plaintiff can not recover.

The guaranty of the defendants, as written out, amounts to this, that the guarantors will pay, if the promisor does not. But this is, in its very nature, conditional. There is no pretense, in any of the authorities, that the holder of the paper upon which the guaranty is written, is bound to do nothing. The plaintiff's counsel do not proceed upon that ground. If he is bound to do something, 440] what is it? To *sue and obtain judgment, it is asserted, is enough. But we do not think so. To demand payment, and notify the guarantor that it is not made, and that, consequently, he is holden, is the diligence which we think ought to be used. Such demand, with a certain knowledge that notice of failure will be given to the guarantor, is calculated to have more effect in stimulating to an effort to make payment, than the prospect of a suit and judgment and execution at a future day. It enables the guarantor to look more effectually to his security, and is, therefore, safest for all concerned. As this demand and notice is neither averred in the declaration nor admitted as a fact in the case, we consider it also a decisive ground against the plaintiff's recovery. Judgment must be for the defendants.†

†NOTE BY THE EDITOR.—The following principles will be found in Ohio Reports touching the rights and liabilities of those whose names do not appear in the body of notes or other contracts, and who have become connected there-

JOHN SMITH v. DAVID LORING.

One of two partners, without the knowledge and consent of his copartner, substitutes the partnership for his individual indorsement on an accommodation note. He is individually accountable to the copartner for any consequent loss.

Recognition of, and voluntary payment of such indorsement to the creditor, does not change liability between the partners.

An agreement to abandon claim against copartner, upon account of such indorsement, though made for some consideration, may, under circumstances of unfairness and advantage, be relieved against in equity.

THIS case was reserved for decision here by the Supreme Court in Hamilton county. It was a bill in chancery, brought by one partner against another, for an account and settlement of the partnership concern.

with by indorsement or otherwise; who are, in the decisions, usually called "*strangers*:"

1. Where a "stranger" affixes his name in blank to a note, etc., *at the time of its execution*, he will be held to be an original maker, ix. 139; xi. 102; xii. 158; xiii. 228; xvii. 36; xviii. 336; but the "stranger" is usually entitled to the privileges of a surety, ix. 141; xvi. 1.

2. The same rule applies to a "stranger" signing *after* the note, etc., is delivered, if it was the "intention" that he should be so held, xiii. 228; xvii. 36; and this "intention" may be proved by parol, ix. 139; xiii. 228.

3. These rules apply to "notes, bonds, and other written instruments," "whether negotiable or not," xii. 228. But see xi. 102, and cases cited.

4. "I GUARANTEE the fulfillment of the within contract," written on a note, by a "stranger," and signed *at the time of its execution*, binds him as a joint maker, and not as a guarantor, xviii. 336, and cases cited; from which it would seem that the *limitations and restrictions* indicated by the language of the indorsement, will not control the legal effect of the engagement, as it would be inferred they would do, from the language of the court in ix. 141; xii. 168. See also Judge Hitchcock's dissenting opinion, and cases cited, xviii. 339.

5. A mere indorsement by a "stranger," will, *prima facie*, be construed to have been made *after* the delivery of the note, etc., and to be a guaranty, xii. 158; xiii. 228; xvi. 1; xvii. 36; xviii. 339; but his true character may be shown by parol, *ib.*

6. A guarantor is entitled to demand on principal and notice of non-payment, see the case to which this note is appended; also, vi. 497; xi. 102; 3

 Smith v. Loring.

The bill stated that the complainant and defendant entered into partnership as merchants, in the year 1817, and continued to deal as partners until December, 1821, when the partnership was dissolved by mutual consent. It alleged that the affairs of the company remained unsettled. But as the controversy related entirely to a single item of account between the parties, it is unnecessary to state more of the case than embraces that item.

The bill charged that, among the unsettled business of the firm, was a claim set up by Loring to charge the complainant with one-half the amount of a partnership liability incurred by Loring for his own account.

It stated that one William Harlow, being in good credit, had obtained an accommodation loan, at the Bank of the United States, 441] in Cincinnati, for sixty-three hundred dollars, *upon the indorsement of Whipple and Washburn, and Oliver Fairchild. That on May 4, 1819, David Loring substituted his individual name upon the note, for that of Fairchild, and the note so indorsed, was discounted, and on the 6th of July, and 7th of September following, notes for renewal were indorsed by David Loring with Whipple and Washburn, and discounted: that in the meantime, the credit of Harlow had very much declined, and on the 9th of November, Loring, without the consent or knowledge of Smith, indorsed the note with the name of Smith and Loring, instead of David Loring, and it was discounted, and the proceeds applied to take up the note indorsed by David Loring alone. And when this note became due, it was protested for non-payment.

The bill further charged, that when the transaction came to the knowledge of Smith, he objected, but was assured by Loring that a full indemnity had been obtained from Harlow, which induced the complainant to rest easy. It charged that the indemnity was altogether insufficient, and that in March, 1824, in settling the concerns of the firm of Smith & Loring, the complainant was charged with, and actually paid one-half the sum of sixty-three hundred dollars, upon account of said indorsement. The bill

Swan, 280, note "a." and cases cited, or an excuse of demand and notice. See cases cited in same note.

7. The engagement of a "stranger," when it is collateral, must be supported by a consideration other than that which moved between the original parties, xvii. 128, and most of the above cases; but the consideration need not be in writing, ib.

Smith v. Loring.

prayed a general and final account, and that Loring should be charged with the amount paid by Smith, upon this indorsement. The answer admitted the indorsements of the note of Harlow, as stated in the bill, and insisted that the name of Smith and Loring was substituted for that of David Loring, in good faith, and in conformity to the power of one partner to indorse the name of the firm. That Whipple and Washburn were indorsers for Smith and Loring, and that the indorsement was made for their common advantage to preserve the credit of all. It alleged that immediately after the indorsement, Smith was informed of it, and did not object.

The answer further alleged that Smith had acquiesced and made no complaint until difficulty arose between them in respect to a transaction at New Orleans, in which an award had been made against Smith. It further insisted *that at the time [442] of making the adjustment with the bank, Loring refused to go into any adjustment or settlement unless Smith would agree to abandon all claim against him for this indorsement. That Smith did make this agreement, and upon that being done, Loring went into the settlement, and it was completed to the mutual advantage and satisfaction of the parties. Further, the answer charged that Smith was justly responsible to Loring for indorsing the name of the firm upon a note of one P. A. Sprigman, without the consent of Loring, all claim for which Loring abandoned at the settlement. It denied that Harlow's circumstances became worse in the summer of 1819, and denied all fraudulent design or intention.

A voluminous mass of testimony was taken, and filed in the cause, from an analysis of which the following facts resulted:

That the name of Smith & Loring was indorsed by Loring in place of his own, without the knowledge of Smith, and that the fact was not known to Smith until after the note was discounted. That at the time the note was protested, or shortly after, an indemnity was given, which was then thought sufficient, and that Smith joined with Loring in a negotiation with the bank to take this indemnity and discharge the indorsers. That in the settlement with the bank, the property of Smith & Loring, though divided between themselves, was given to the bank at a joint valuation, and each of them received a credit for half the value. At the time of the division, Loring had agreed to give Smith two-

Smith v. Loring.

hundred dollars for his choice, which was unpaid, and which Smith was induced to relinquish at the settlement; that Loring had made most improvements, and that when the property was given to the bank, Loring's part rented for one hundred and fifty dollars per annum more than Smith's. That at present the rents were about equal, and the property esteemed of about equal value.

That at the time of this settlement Smith manifested great anxiety to effect it. That for the Sprigman indorsement there was a judgment against Smith, and an execution levied on his property, but no judgment against Loring. That Smith, through the 445] negotiations of friends, agreed to *give up his claim for the Harlow indorsement, and that Loring agreed to give up his claim for the Sprigman indorsement, in respect to which it appeared that it had been originally made by Loring, and not by Smith, but with his assent. That subsequently an agreement was made that Sprigman should obtain other indorsers, but not being able to effect this, Smith indorsed a note for renewal and to prevent a protest, and that Loring subsequently indorsed another note to be renewed, but it was not discounted, and the protest and suit were had upon the note indorsed by Smith. That the circumstances of Harlow were bad in May, 1819, but it was not so well known as it was in the autumn of the same year.

N. WRIGHT, for complainant:

1. There is a wide distinction between the liabilities of partners to third persons and their liabilities to each other. A partner may often be bound to a third person by the act of his co-partner, where there is no liability as between themselves. The liability as relates to third persons rests upon general principles of mercantile policy; but as between themselves it rests upon a single and very simple principle.

"A partnership is a contract between two or more persons for joining together their property, labor, or skill, upon an agreement that the gain or loss shall be divided proportionally between them." The gain or loss is confined to the objects of the contract, and embraces the ordinary business contemplated by it. A gain or loss arising in a transaction by one partner, *out of the ordinary scope of the partnership business*, is not a subject of division between

The folio on this page should be 443, but it accords with the original.

Smith v. Loring.

the partners. To such gains the partnership contract creates no community of right, and no community of burden as to such losses. Wats. Part 1.

It is not the ordinary business of a mercantile co-partnership to indorse notes as security, or in any way become surety for others; of course the loss occasioned by such a transaction falls exclusively upon the partner who was the immediate agent in it. The first part of this proposition would seem plain from the very object of such an association. It is to make gain by merchandising, not to accommodate *friends or the world at large with [446] sureties. The perils of the connection are great enough without such an extension of authority, and the contract being to carry on merchandising, no stretch of construction can imply from it an obligation to participate in cases not arising out of that business.

The case of Foot v. Sabin, 19 Johns. 154, arose directly upon this point, although being between partners and third persons, it is not so strong for complainant. It arose on the effect of the firm name given by one of the partners as security on a joint note. After alluding to the general principle that one of the firm can not give the partnership security for his individual debt, it is there said that "the case is still stronger when one of the partners becomes *security for another* and attempts to bind his co-partners; it is a fraud on such of the partners as do not consent *expressly* to be bound, for the creditor is aware that it is a pledging of a partnership responsibility in a matter in *no wise connected with the partnership business*. When, therefore, it was shown that the note was signed by H., as principal, and by W., with the name of W. & F. as surties, nothing was shown to bind F.," etc.

It is proper here to remark, that as between the partners and third persons, there is a difference between the decisions in New York and England, on the question of the liability of the firm in such cases, the former holding that it rests with the creditor to show the express assent of the other partner, or he is not bound; and the latter, that "the burden of avoiding such security rests with the firm, who must prove that the act was covinous in the partner who gave it, by showing it was done without the knowledge and against the consent of the other partners, and that the fact was known to the creditor when he took the paper of the firm. Dob v. Halsey, 16 Johns. 38; 13 East. 182; 7 East. 210.

As between the partners, this difference is of no importance,

Smith v. Loring.

but it may be material with reference to their liability to third persons.

2. If one partner pays his individual debts out of the partnership means, he is chargeable with the whole amount *thereof in the settlement of the accounts between the partners.

I take it, that this proposition needs neither argument nor authority to support it; and I take it to be equally clear that the principle is not confined to debts, technically so called; but applies equally to all claims or liabilities, on which money or other thing of value might be collected; and that there is no distinction between a debt or liability of an individual partner, arising as surety or indorser for another, and a debt or liability originally and exclusively his own. They are all alike his individual concerns, and have nothing to do with the partnership contract.

The great mass of cases, in which it is so abundantly declared that one partner can not bind the firm by giving the joint name for his individual debt, have very little to do with the present case. 2 Johns. 300; 4 Johns. 251; 11 Johns. 544; 1 East, 48; 10 East, 264; 13 East, 175.

Those cases turn upon general questions of mercantile policy, how far the world at large have a right to hold the parties as they appear upon negotiable paper without inquiry into circumstances; how far it is better to charge individuals with debts not their own than to throw embarrassments upon the money or credit transactions of the mercantile community; and do not in any way involve the question, whether the individual debt of one, paid or secured by him with the partnership means, shall be charged to him individually as between themselves.

The English cases proceed upon the ground, that it "may frequently be necessary that the private debt of one partner should be satisfied at the moment, for the ruin of one partner would spread to the others, who would rather let him liberate himself by dealing with the firm;" and therefore the creditor taking such security has a right to presume some such understanding, unless notice of the contrary is shown; and on this ground they admit evidence of all circumstances and conduct of the partners, both at the time and subsequent to the transaction. But I conclude that in these cases, though the firm should all be holden for the individual debt of one, it by no means follows that the one is not chargeable with the whole debt as between themselves. 8 Ves. Jr. 542; Chitty on Bills, 43.

*3. An agreement to release a debt, if without consideration, is nugatory and void. [448

All contracts without consideration are void. 1 Fonb. Eq. 335; 4 Johns. 235; 2 Johns. 186; 9 Johns. 358.

In *Heathcote v. Crookshanks*. 2 Dumfd. and East, 27, it was expressly decided, and treated as an old and settled principle of common law, that an agreement to take five pounds in satisfaction of a debt of twenty, is *nudum pactum*, and no defense to the action. The court say, "it is not binding in law." See Co. Lit. 212, b.

Fitch v. Sutton, 5 East. 231, was a case of express agreement to receive seventeen pounds ten shillings, in satisfaction of a debt of fifty pounds, and receipt in full given to that effect, but held to be no defense. "There must," it is there said, "be some consideration for the relinquishment of the residue, or it is *nudum pactum*."

In *Harrison v. Wilcox and Close*, 2 Johns. 448, on a note for seventy dollars, plaintiff agreed, that if W. would pay him twenty-one dollars he would not call on him for the balance, on which the twenty-one dollars was paid, but the court said it was no defense, and a *nudum pactum*.

A promise to give time on payment of part of the debt is void. 12 Johns. 426.

Seymour v. Minturn, 17 Johns. 174, was a case of a written agreement, drawn up with much formality, to release the defendant from all demands, but not under seal; the court say, "The want of an adequate consideration is an insuperable objection to its operating as a release," and they held it no defense.

In the last case application was afterward made to chancery, but the same doctrine was there held by Chancellor Kent; and relief denied to Minturn. 4 Johns. Ch. 499.

In these cases and other similar ones, it is repeatedly laid down as the settled law, that doing what a person is legally bound to do, as paying a part of the debt, etc., is no consideration.

4. Any confirmation of a proceeding affecting the rights of a party, or relinquishment of claim, or acknowledgment of satisfaction, made under a mistake of the party's rights, either in point of law, or fact, is not obligatory.

*There is a marked distinction between a contract between [449 persons by which rights are vested and divested, and a mere confirmation of an act done, a relinquishment of a claim, or acknowledgment of satisfaction. By the latter no new rights are created

Smith v. Loring.

or vested, but merely evidence is furnished in the nature of admissions that facts are so and so. Thus a promissory note, being an original contract, can not be explained nor denied on the ground of a mistake of law, unless under some very extraordinary circumstances. But a receipt, being merely an admission and vesting no rights, can always be explained, and a mistake in law may as well be shown to contradict it as any other circumstance, as some of the cases last cited show. This distinction between *agreements*, if I may so use the term, in the nature of *contracts*, and those in the nature of *admissions*, must be kept distinctly in view, or the decisions on these questions will appear to be a mass of utter confusion.

In the case of *Pusey v. Desbouvrie*, 3 P. Wm. 315, a daughter of a freeman, in London, accepted a sum of money as a legacy, in extinguishment of her orphanage part, and *gave a release*; and, although she was told she might elect which she pleased, yet, as she did not know of her legal right to inquire into the value of personal property to ascertain the amount of her orphanage part before her election, her release was, on that account, set aside in equity.

In *Perrot v. Perrot*, 14 East, 438, an actual canceling of a deed of appointment by tearing off the seal, etc., was held nugatory and void, because the person did it under a mistake of the *legal operation* of another instrument. See 1 P. Wm. 345; 2 Vern. 742.

In *McLean v. Walker*, 10 Johns. 485, which was trover for a note which had been delivered to defendant as a pledge, it is said by the court, "that the acknowledgment of the party, that the note was then absolute, can not affect his rights under the agreement; it was merely his *unadvised opinion*, which he had *right to correct* with better advice."

Putnam v. Westcott, 19 Johns. 75, was a suit against a constable 450] to recover back the purchase money of a lease *sold and conveyed by him under execution; and it was held, the constable having no legal authority to sell such property, that the money might be recovered back, on the ground that it was paid under a *mistake of the law*.

In *Gray v. Murray*, 3 Johns. Ch. 188, Chancellor Kent says: "It is a well established, as well as a most reasonable principle, that to constitute a confirmation, the party confirming must be *fully apprised of his rights*." See 1 P. Wm. 732; 1 Ball. & B. 339.

Smith v. Loring.

The case of *Levy v. United States Bank*, 1 Bin. 27, is strongly analagous. Plaintiff received from a third person a check on the defendants which was presented and passed to his credit, but was afterward found to be a forgery. A clerk of the bank called on him to adjust the matter, and to get his own check for the amount. A good deal of conversation passed, and plaintiff, among other things, expressly stated, "on that point we are perfectly agreed. If the check is a forgery, which is all I wish to ascertain, it is no deposit." The court decided that it was no defense. They say, "being done by plaintiff under a *mistake of his right*, he is not bound by it." They recite the remarks of Lord Hardwicke, in *Penn v. Lord Baltimore*, that "if Lord Baltimore made the agreement under a mistake of his right to another degree of latitude, he ought to be relieved." Many of the cases of money paid under a mistake being recovered back, rest upon similar grounds, viz: mistakes of law.

5. When an indorser or surety takes up the debt and prosecutes his principal, he is not bound to show absolutely his own liability to pay the debt. It is different on bonds of indemnity, given to secure one against claims. There the claims must be shown to have been legal, but in the above cases of surety the rule is different; there, it is immaterial to whom the principal pays the debt, whether to the surety or the original debtor; he loses nothing by either course, and the surety is only bound to show what the law will imply to be a *request*, so as to avoid the mere technical objection of paying without request; and wherever one man's name is used, or his means applied with the *assent* of another, for his benefit, the request is implied. Suppose *a man had forged my [45] name to his bond as surety, and which I had taken up and paid, could he prove the forgery to defeat my claim against him? In all ordinary cases to recover money paid as surety, the instrument and payment are sufficient proof. The actual liability is not inquired into. So on indorsed notes, the payment of the note by the indorser is sufficient proof, without inquiring into his liability. This is proved by the very common rule that an indorser actually discharged, or never liable for want of notice, may make himself liable by a subsequent promise to pay; and on this subsequent liability, which is the result of his own voluntary act, has not equal recourse against the principal.

In *Philips v. Thompson*, 2 Johns. Ch. 420, the chancellor held

Smith v. Loring.

that an indorser, discharged by want of notice, might not only take up the note, but hold on to the securities given for his indemnity.

So, in the case now before the court, if it were shown (which certainly is not) that Smith was not liable to the bank, yet Loring, by whose act Smith's name was on the paper as a surety, could not be heard to make that a defense. In addition to the above principle of law, it will be recollected that Loring insisted that Smith was liable to the bank, and on that ground induced him to pay the debt; and surely he can not now be heard to deny that liability; to-day insisting he shall pay, for he is liable, and to-morrow denying his liability, and telling him he has paid in his own wrong. Again, the result of such a position would be idle and useless. If Smith was clearly and absolutely not liable to the bank, and had no right to pay the debt for Loring, having paid it under a mistake, he may recover it back, and leave the bank to their further recourse upon Loring.

Precisely the same state of fact which would defeat Smith's right to recover back the money, would establish his right to recover of Loring.

6. It may, perhaps, be of consequence to refer also to the principle of law, that money obtained by extortion, imposition, oppression, or taking undue advantage of the parties' situation, may be recovered back. 2 Burr. 1012; Doug. 696.

452] *And this principle extends to money paid on duress of goods, and generally when it becomes necessary to prevent a heavy loss of property:

As to obtain plate illegally detained. 2 Stra. 916.

To release ships under detention. 9 Johns. 209, 375.

To obtain deeds and court rolls. 2 Esp. 727.

To prevent sale of land for taxes, etc. 2 Day, 369.

Storer, for the defendant, contended:

That the indorsement of the firm name, considering the principles on which the partnership was formed, was an act which the defendant was authorized to do. The copartnership was of a general nature. No particular limitations or conditions were attached to it other than those imposed by the rules of law. The question, then, resolves itself into the point whether the act done by the defendant was in the ordinary course of trade or dealing between

Smith v. Loring.

merchants. In discussing this proposition, the situation of the country, the business in which the parties were engaged, in fact the whole scope of their commercial arrangements must be regarded. It is certain that Loring was the active partner; that he attended to all the banking business of the firm; that he was permitted to exercise a great degree of discretion in the management of the partnership concerns; that confidence was reposed by Smith in his capability, honesty, and intelligence. Under these circumstances the firm became the indorsers of Whipple & Washburn, who, in return, were the indorsers of the firm. Harlow's credit had been sustained by the same indorsers, and a protest of his notes would have destroyed their credit, which must, of course, have materially injured if not wholly ruined Smith & Loring. Was it, then, inconsistent with his duty to his copartner for Loring to pledge the name of the firm on Harlow's note? But it is said that Loring had been the previous indorser, and the partnership security was not given until Harlow had become embarrassed. The fact of such embarrassment is not admitted; but if it were, there was the same obligation on the part of Smith to sustain the credit of Whipple & Washburn, as attached to Loring. Again, it is fairly inferable *from the manner in which the business [453 of the firm was transacted, that either partner was at liberty to indorse the firm name without consulting his copartner, subject, however, to those limitations which good faith and common prudence always apply where the least discretion is exercised. 1 Salk. 292, Evan's edition, and the note to the case; Watson on Partnership, 123; Livingston v. Roosevelt, 4 Johns. 267, opinion of Judge Vanness; Gallway v. Mathew, 10 East, 265.

A distinction is taken by the complainant's counsel, that cannot be admitted to be sound law or sound reason. It is contended, that, however the act of one partner might bind the firm, as to third persons, the rule would be different as to their rights and liabilities *inter se*. On what, it is asked, is the liability of the firm to third persons predicated? Is it not that the act done is performed in the course of business, and for the benefit of the concern? If it is, does not the same rule obtain as to the private rights of the partners? No case is cited to prove a contrary position, though the complainant's counsel have quoted a multitude of cases to show on whom the burden of proof is thrown, when it is sought to create a partnership liability. In the opinion of Chief Justice Spencer, Foote v. Sabin,

 Smith v. Loring.

19 Johns. 158, it is clear "that a state of case existed, where the party taking the firm security was well aware it was not for mutual benefit." The general proposition deduced from this authority, by the complainant's counsel, can not then be supported to the extent for which he contends.

If Loring, however, was not strictly authorized to indorse the firm name, still the knowledge of Smith, of the fact, shortly after it transpired; his continued silence for years; his subsequent transactions in business with Loring; his negotiations to secure the firm; and his attempts to compromise and settle the claim; in fine, his whole conduct, shows the strongest possible case of subsequent approbation of the course pursued by Loring.

It was settled by Lord Eldon, in *ex parte Bonbonus*, 8 Ves. 542, "that previous authority, or subsequent assent, would be sufficient to bind the partnership for an act done by any member of the firm." 454] The same doctrine is found in the text to Fell on Mercantile Guarantees, 148; also see *Duncan v. Lowndes*, 3 Camp. 478; and the late case of *Sandilands et al., executors of Howden, v. Marsh*, unanimously decided by the King's Bench, in 1819; 2 Barn. & Ald. 678; also, *Eaton v. Taylor, et al.*, 10 Mass. 54.

Again, at the time the arrangement was made between Smith and Loring and the bank, for the settlement of Harlow's note, it was done by Smith, with a full knowledge of all the facts, as will appear from the testimony. Smith, by acceding, therefore, to this arrangement, has paid his money voluntarily, and can not now recover it back, unless fraud, misrepresentation, or coercion be shown. *Livingston v. Roosevelt*, 4 Johns. 251; *Dob v. Halsey*, 16 Johns. 34; *Chitty on Bills*, ed. 1817, p. 40-52, *cum notis*.

What are voluntary payments within the meaning of the rule. 1 Wheat. Selw. N. P. 66; *Brown v. McKinley*, 1 Esp. N. P. C. 279; *Cartwright v. Rowly*, 2 Esp. 733; *Gower v. Popkin*, 2 Stark. 76; *Marriot v. Hampton*, 7 Term, 269; *Bilbic v. Lumley*, 2 East. 470; Day's ed. *cum notis*; *Hall v. Schultz*, 4 Johns. 243; *Gates et al., v. Winslow*, 1 Mass. 66; *Homes et al., v. Aery*, 12 Mass. 137.

There was no mistake or ignorance of the facts, on the part of Smith, and it can not be contended that ignorance of the law, if there was any, can avail him. *Lord Irnham v. Child*, 1 Bro. C. C. 92; *Lord Portmore v. Morris*, 2 Bro. C. C. 219; *Mildmay v. Hungerford*, 2 Vern. 243; *Worrall v. Jacob*, 3 Merriwale, 271.

Smith v. Loring.

The complainant's counsel, however, have quoted a number of cases, to support a principle not clearly understood by us.

It would seem that a distinction is attempted to be drawn between *ignorance of the law*, and *mistake of the law*. Now, we conceive them to be convertible terms. It has been said, that ignorance is not always mistake; and it may be said, that the law does not regard *willful ignorance*, nor *willful error*. The case of *Pusey v. Desbouvrie*, 3 P. Wms. 320, proves nothing but an ignorance of the fact, and Lord King, in *Onion v. Tyner*, cited by complainant's counsel, from 2 Vern. 471, decides the point in controversy, on the ground of accident and mistake of the fact. Lord Ellenborough, in *Perrot v. Perrot*, 14 East, 439, took a *similar ground. [455] The case of *Lansdown v. Lansdown*, Mosely, 364, has always been regarded as deciding no more than that the schoolmaster's mistake of the fact furnished a ground for relief.

But the whole subject matter of the indorsement, and all the claims of the parties, arising out of it, were finally adjusted, in the settlement and arrangement made with the bank, as it fully appears from the testimony of several witnesses. It is answered, however, that there was no consideration to support such an agreement; that it was made, if it was ever understood to be made, by the parties themselves, while Smith was under a mistake as to his rights, and while Loring had such an advantage over him, that the parties were not placed on equal terms, when such settlement was made. Admit that it was necessary to prove some consideration to support the agreement, there certainly was a manifest difference in value between the property sold by Loring and that sold by Smith. The difference, whether it were equal or not to the pretended loss on the part of Smith, is an adequate consideration in point of law. Again, in the settlement of partnership accounts, where the parties are supposed to know best their own interests, where great confidence has been reposed, and mutual concessions required, it must always be the case that much will be arranged by compromise. Whenever an adjustment has once taken place, and the principles on which it was founded have been acted on by the parties subsequently, it can not be either just or proper to open it up. In *Cann v. Cann*, 1 P. Wms. 726, Lord Macclesfield held: "That an agreement entered into, upon the supposition of a right, or a doubtful right, though it afterward come out that the right was on the other side, should be binding, for the

Smith v. Loring.

right must always be on the one side or the other; therefore, the compromise of a doubtful right was a sufficient consideration for an agreement."

Inadequacy of consideration will never avoid a contract, unless it is so gross that fraud will necessarily be inferred. 1 Maddox ed. of 1822.

In *Stephens v. Lord Bateman*, 1 Brown's C. C. 22, it is said, 456] "that if a deed is entered into by parties fully apprised *of their rights, in order to put an end to a suit, though upon inadequate consideration, it can not be set aside." See also *Sugden on Vendors*, 170, 171.

But it is again asserted, that the proof does not furnish any evidences of such consideration. The court are referred to the depositions, which convince the defendant's counsel, at least, that there was a full compensation paid.

On the point of any inequality existing as to the situation of the partners, at the time of the settlement, the only fact gleaned from the evidence is, that judgments existed against Smith, for the partnership debts, which did not affect Loring's property. To this fact is added a remark, that Loring is stated to have refused all overtures, on the part of Smith, to settle the matter, unless he would release his pretended claim to indemnity, for the Harlow indorsement. How far these circumstances amounted to coercion, or placed the parties on unequal grounds, it is impossible to conceive. There were judgments too against Loring, and there was a mortgage for a firm debt, which covered the whole property. No threats were used; but, on the contrary, much negotiation was carried on, and every attempt made by Smith to induce Loring to acquiesce in the offer of the bank, as to the purchase of the property.

The abstract proposition that coercion, on the part of the party to be benefitted, destroys the contract, as against the party making it, is admitted; and the authorities quoted by the complainant's counsel, are not denied, with the exception of *Astley v. Reynolds*, 2 Str. 916, which has been very properly overruled by Lord Kenyon in *Knibbs v. Hall*. 1 Esp. 84.

The cases cited by complainant's counsel, to show that an agreement to release a debt, made without consideration, is void, are not denied; but, it is rather singular, that every case quoted is confined to executory contracts only; not where the sum agreed

Smith v. Loring.

to be paid for the release, or the act to be performed, has been paid or perfected.

On the whole, if there has been any fraud, coercion, or imposition, on the part of Loring, it is not discoverable from the history of the case. If he can not be protected from the *claim of [457 the complainant, by the grounds assumed in his defense, it is difficult to perceive where liabilities can not be created.

BENHAM, on the same side:

This controversy has arisen out of a copartnership, which, it was admitted, was *general* in its nature, as contradistinguished from those which are *special*. It was unlimited in duration, and undefined in all other respects. Loring, it seems, was the most skillful and experienced, and, therefore, the active partner, on whom devolved the weight of its concerns. He attended particularly to the correspondence and financial arrangements, by the judicious management of which, their credit, which was *their* capital, was sustained. It is certainly competent and prudent, where persons form this fiducial and important connection, to stipulate among themselves, as matter of private compact, that they are severally to be responsible only for their own losses and defaults; to define the manner in which the business of the firm shall be conducted, its duration, the proportion in which the profits and losses shall be distributed, and the mode of adjusting their accounts and difficulties. But as Smith and Loring did not think proper to do so, their respective powers and rights can alone be ascertained and settled by implication of law. The liabilities of partners are coequal with their rights. Each reposes confidence in the skill and integrity of the other, and constitutes him his general agent, with plenary powers as to all matters which involve the interest of the firm: hence, as a general rule, it is always bound by the acts of each member in the course of the partnership business.

1. The power of one partner to bind the firm by making, indorsing, and accepting promissory notes and bills of exchange, was settled as early as the reign of William III., upon the custom of merchants, and has never since been doubted. 7 Term, 206; 4 Johns. 265; 1 Caine, 184; 4 Day, 430; 5 Day, 511.

The firm is bound by the acceptance of a bill of exchange, drawn upon the firm, by a single partner, and whether it has funds or anticipated funds, or whether it be *for the honor of the [458

Smith v. Loring

drawee are immaterial. Holt. 67; 1 Salk. 126; 1 Ld. Raym. 175; 5 Day, 511.

In like manner, the indorsement of a bill or note by one partner, in the name of the firm, *prima facie* binds the firm. 7 East. 213; 13 East. 175. And these cases show that the partnership can only evade liability upon the ground of fraud or collusion between the holder of the paper and the partner who made the indorsement. For it seems to be well settled, that if a creditor of one partner collude with him to take payment of his individual debt, out of the partnership funds, *knowing at the time that it is without the consent of the other partners*, it is fraudulent and void. But if it be taken *bona fide*, without such knowledge *at the time*, the partnership can not disaffirm the act. One of two partners may give an authority to the clerk of a firm to accept bills, and sign and indorse notes in the name of the company. 1 Caine, 192; 3 Caine, 368; 1 Dall. 269.

It is, therefore, clear that Smith and Loring each had power to indorse, draw, and accept notes and bills of exchange in the name of the firm; and I contend the indorsement of Harlow's note, under the peculiar circumstances, was but a fair and *bona fide* exercise of it. When they entered into partnership, they were bound to know the law applicable to the relation it formed; and we must presume, as this copartnership was unlimited, the partners, with an eye to their own interest and convenience, deemed it expedient to delegate to each other in mutual confidence this power, and were willing to incur the hazard of its abuse. The power thus conferred was reciprocal, and the danger of its abuse was equal. Suppose, in the plenitude of their confidence, when this partnership was formed, they had conferred this power on each other by *express compact*, would equity listen to a complaint founded upon the injudicious exercise of it; and if not, with what propriety can Smith ask relief in this case? In this case, the power to indorse was conferred by implication of law, drawn from the unlimited nature of the copartnership. It was an incidental power, and in the case put it would have been conferred by compact, but the responsibility must be the same in both cases.

459] *2. Again. The power to indorse notes under the circumstances which Loring indorsed the Harlow note, may be deduced from the previous conduct of the firm. The deposition of Sprigman and others, show, that previous to the indorsement of

Smith v. Loring.

Harlow's note, the name of Smith and Loring was indorsed on the note of Sprigman and Neply for the accommodation of the latter. The complainant acquiesced in this transaction, and the firm was at length, after the note had been several times renewed upon discount in the Bank of the United States, compelled to pay it. This indorsement, which received the sanction of Smith, was in every respect similar to the indorsement of Harlow's, except that Smith indorsed the Sprigman and Neply note the last time it was renewed by the bank. Accommodation indorsements, when made by one partner without the consent of the other, are analogous to *guarantees* given by one partner without the privity of the other to secure the debt of a third person; at least the analogy holds good as far as this, that in both cases, *subsequent recognition is tantamount to previous command*, and the authority may be deduced in both cases by the previous *course of dealing*. Lord Eldon, in *ex parte Garden*, 15 Vesey, 286, has decided that one partner can bind the firm, by a guarantee in the name of the firm, for the responsibility of a third person; and Lord Mansfield holds the same opinion in the case of *Hope v. Cust*, cited in *Sheireff v. Wilks*, 1 East, 53. But Lord Ellenborough, in 13 East, 180, inclined to a different opinion, because he thought such a power was neither *necessary* nor *usual* in carrying on a joint concern, and, therefore, could not be claimed as incidental to the general power of a partner. They are indeed mere gratuities, which do not, like bills and notes, conduce to facilitate and protect trade. But Lord Ellenborough, in the case of *Duncan v. Lowndes*, 3 Camp. Ni. Pri. 478, says that to prove the authority of one partner to give a guarantee in the name of the firm, evidence of "*subsequent recognition is tantamount to previous assent or command*," and that proof of a previous course of dealing, in which similar guarantees were given, and to which both partners were privy, would bind the firm. I rely with emphasis upon the last case cited, for the proof is complete, not only that Smith subsequently recognized the Harlow indorsement as obligatory upon the firm, but acquiesced therein for a long time after the dissolution of the partnership, and united with Loring to obtain an indemnity from Harlow; it is also clear, that the previous conduct of the firm, in relation to the Sprigman note, was an invitation to Loring to act as he did, for here Smith himself was his exemplar.

4. But the counsel for the complainant insist that Loring was

 Smith v. Loring.

not authorized to substitute the firm name for his individual liability—that neither the previous course of dealing, nor the unlimited nature of the partnership, conferred upon him this authority. I think I have shown that this proposition, under the circumstances of the case, is not tenable; but, if it be tenable, what does it establish? Nothing more nor less than that Smith was not originally bound by the indorsement. And if not bound by the indorsement, how came he bound at all? I answer, by his subsequent recognition of the respondent's right to bind the firm, which the law regards as equivalent to a previous command. When complainant was informed of the indorsement, he was free to affirm or disaffirm the act—he chose the former. Harlow was then in good credit, and extensively engaged in business, and complainant could not charge the respondents with having acted *mala fide* in relation to the interest of the firm; for he well knew their credit in the Bank of the United States was indirectly identified with Harlow's, as Harlow's principal indorsers were also their indorsers. As he then voluntarily, with a full knowledge of all the circumstances, made his election to ratify the indorsement, he must abide by it, and share his moiety of the loss, which it seems he was willing to do. Indeed, the payment of the one-half of the note, all *duress and fraudulent concealment* apart, was *per se*, an agreement to share the loss, if any should ultimately be sustained. It was a voluntary payment for the benefit of Harlow, to whom alone he can look to be reimbursed. It can not be regarded either in law or equity, as a payment for the use of respondent, which *ex equo et bono*, he ought to pay back. The respondent, so far from being benefited, was an equal sufferer with the complainant. 461] *It is clear, that Harlow is liable to complainant for the amount paid, with interest; but it seems that the Terre Haute lands were an inadequate indemnity, and Harlow is an insolvent; therefore, the complainant ought to recover the amount paid from Loring. This logic is as sound as just. The complainant paid the one-half of his note voluntarily, knowing all the facts, and he can not recover it back, except from Harlow, for whose benefit it was paid. 4 Johns. 240; 1 Esp. Ni. Pri. C. 279; 2 Ib. 723; 2 East, 470.

If one partner pay money for, and in the name of the firm, which the firm was not legally or equitably bound to pay, it is a

 Smith v. Loring.

payment in his own wrong, and he can not call upon his co-partners for contribution. 8 Taunt. 443; 14 Johns. 318.

So, if money be paid on a note, against which the party paying had a defense, it can not be recovered back, 9 Johns. 244, unless it was paid under a mistake of the *facts*. 7 Johns. 442.

We are gravely told by Mr. Wright, and the sages of the law are called to witness it, that a surety can recover back money paid for his principal. We need no ghost to tell us this, for it is a principle of natural justice. But we deny that this is a case between principal and surety. It would be if Harlow were the respondent instead of Loring. But upon the record, it is manifestly a controversy between two unfortunate sureties, who have been compelled to pay money for an insolvent principal—a contest embittered by former friendship and confidence, where one surety after he has *voluntarily* paid his proportion, modestly asks a court of equity to coerce his co-surety to pay it back, and sustain the whole loss himself.

Again, counsel contend, with equal cogency, that the complainant ratified the indorsement, and paid the money from an ignorance of the *law*; and, therefore, the respondent, the Bank of the United States, or some person else, ought to refund it. But, in support of this proposition, the sages of the law do not appear.

This would, indeed, be a convenient doctrine in all desperate cases, but a very inconvenient general rule. It would be [462] a tax upon science to enhance the price of ignorance, a staple more abundant in our market. "*Alioqui erranti lucro esset ignorantia juris*." But notwithstanding the well known chivalry of the law, neither females nor infants can plead ignorance of it. "*Juris error nec fœminis incompendiis prodest*." Prothier on Obligations, 413.

But the depositions of Messrs. Avery, Washburn, Earl, and Hunter, abundantly prove that complainant had a full knowledge of both the *law* and the *facts* long before the settlement was amicably concluded with the bank. And it is well settled, that a court of equity will not relieve a party from his acts and deeds, fairly performed with the knowledge of the *facts*; although he might have been under a mistake as to the law, for he is bound to know the law at his peril. 2 Johns. Ch. 51, 60.

5. It is admitted that the claim which is now sought to be enforced, has been amicably settled between the parties. But the

 Smith v. Loring.

complainant insists that the settlement is not obligatory: 1. Because it was without consideration. 2. Because the consideration was inadequate. 3. Because the settlement was coerced or extorted by respondent, who took advantage of his situation.

1. As to the first objection to the validity of this settlement founded upon the want of consideration, I admit, that to make a contract binding there must be a consideration of some sort. Fonb. Eq. 342, n. a. Otherwise neither a court of law nor equity will enforce it. This claim seems to have been originally asserted by way of set-off to a claim made by respondent, for difference in the value of their real property, which they had proposed to convey to the bank, in payment of all their responsibilities. And it is clear, that respondent's real property was worth several hundred dollars more than complainant's; that he had given two hundred dollars more for it, at the time of the division, and had subsequently made valuable improvements. Now, this difference in value, together with his claim on account of the Sprigman indorsement, respondent agreed to relinquish, and complainant, expressly in consideration thereof, relinquished the claim for the Harlow indorsement. 463] Whether this consideration were inadequate *or not is immaterial; for no case can be found where inadequacy of price independent of other circumstances, has been held sufficient to set aside a contract. Fonb. Eq. 126, n. a.; Ch. Ca. 159; Ambler, 18; 1 Bro. Ch. 9, 22; 2 Bro. Ch. 17.

There is a manifest difference between an *executory* and *executed* agreement. A court of equity always exercises a sound discretion in relation to the former when asked for a specific execution. But an agreement, executed in good faith, though the consideration be inadequate, forever concludes the parties to it. Fonb. Eq. 126, note a. Nothing short of a fraud or palpable mistake will afford ground for relief.

Mr. Wright has cited numerous authorities to show that money obtained by extortion, imposition, oppression, may be recovered back. The leading principle which governs all the cases brought for money had and received, is, that the defendant, as an honest man, *ought* to pay the money. *Si apparet eum dare oportere*. There can be no doubt that money paid by mistake may be re-demanded, if, in justice, it ought to be repaid. 1 Term, 286; Cowp. 565. But where both parties are under a common mistake the one can not recover of the other. 4 Bos. & Pul. 260. Nor can

Smith v. Loring.

money paid, with full knowledge at the time of all the circumstances, be recovered back. 2 East, 4, 69; 2 Esp. 723; 1 Esp. 84; Ib. 279. Nor can money be redemanded if it be paid where the law would not compel payment, but where natural equity would dictate it. 1 Term, 286; 2 Sir Wm. Black. 824; Stra. 915. Where money has been paid on a void authority, it may be recovered. 1 Lord Ray. 742; 2 Ib. 1216. Where money has been paid under a judgment of a court of competent jurisdiction, it can not be recovered. And this was the principle decided by Lord Mansfield in the leading case of *Moses v. Macfarlan*, 2 Bur. 1005, upon which Mr. Wright relies as analogous to this. In that case the court of conscience, whose proceedings were reviewed, had determined that it was not competent to enter into a consideration of the agreement set up as a defense against the indorsements.

*The money, therefore, was not recovered by *Macfarlan* [464 against *Moses* by the judgment of "a court of competent jurisdiction," else it would have been conclusive. But this case has not been acquiesced in by the profession. It was shaken, in principle, by *Marriot v. Hampton*, 7 Term, 269; and *Brown v. McKinnally*, 1 Esp. 279. The old cases are discordant. The cases of *Moses* and *Macfarlan*, although frequently cited, as in this case, to show that money obtained by extortion, etc., may be recovered back, is not an authority to sustain that principle. The case of *Smith v. Bromly*, Doug. 696, has been cited. That was an action for money had and received to plaintiff's use. The plaintiff's brother had committed an act of bankruptcy, and the defendant, his chief creditor, had taken out a commission against him; but afterward, finding there was like to be no dividend, *refused to sign his certificate* unless the bankrupt, or somebody for him, would advance forty pounds, and give a note for twenty pounds more. The plaintiff, who was the bankrupt's sister, moved by his distress, had paid the demand for signing the certificate, and Lord Mansfield decided that the money might be recovered back. That the demand of the defendant was oppressive and wrong in itself, if not a fraud upon the other creditors. He had taken an unfair advantage by putting the compassion of his relations to the torture, and *the demand was a violation of the statute, which prohibited such inducements being given*. The case of *Asley v. Reynolds*, 2 Stra. 916, plate was pawned to raise twenty pounds; when the pawner came to redeem, he offered to pay the principal and four pounds interest,

Smith v. Loring.

which was more than legal; but the pawnee demanded ten pounds, and refused to deliver the plate unless it were paid. The plaintiff paid it, and brought his action to recover the surplus beyond the legal interest, and recovered upon the principle that a court of equity will compel a usurer to refund what he has received above the principal and legal interest; and that no one would transgress a law made for his own *advantage* unless compelled. But the principle of this case has been subsequently overruled by Lord Kenyon in *Knibbs v. Hall*, 1 Esp. 84. But why 465] should I dwell upon this class of cases, as none of *them bear any analogy to this case? It is urged that respondent refused to unite with complainant in the proposed settlement with the bank, unless he would consent to pay a moiety of Harlow's note, and threatened to break off the negotiation, and leave the complainant in the breach to make the best arrangement he could with the bank, who had judgment liens upon his real estate. If all this be admitted it will not entitle the complainant to relief. The respondent was under no moral or legal obligation to unite with complainant to transfer his real estate to the bank; and had he refused to do so, the complainant's situation would have been no worse than it was before the subject was agitated. Had the respondent been the agent in augmenting the complainant's embarrassments; had he contrived to place him and his property at the mercy of his creditors, and then had taken advantage of his distressed situation to compel him to pay the Harlow note, the case would have been different. Suppose A have a judgment upon the lands of B, and threaten to proceed to sell them at a sacrifice unless B shall take such sum as he choose to offer, and B accepts his offer and conveys, will any one contend B would not be bound, or that he could be relieved from the sale because A took advantage of his situation? The rule, *volenti non fit injuria*, must apply in such cases or there would be no end to litigation, nor sanctity in contracts and settlements. *Hall v. Shultz*, 4 Johns. 240.

The effect of granting the relief prayed for, will be to enrich one partner by the ruin of the other—against whom no imputation of having acted *mala fide* can, with propriety, be made.

HAMMOND, for complainant in reply:

The legal principles involved in this case have been very fully argued by Mr. Wright, and I shall not repeat what he has said.

Smith v. Loring.

The positions taken by the defendant's counsel require but a very brief notice.

1. The power of Loring to make the indorsement so as to bind Smith to third parties is not drawn in question. All that is said on that head may be laid out of the case. Loring had power to take the partnership funds and apply *them as his own. [466 But this power could not excuse him from accounting for them to Smith. It is in this light that we consider the substitution of this partnership name for his own, at a time when loss was evident and actually ensued.

2. Smith's subsequent assent, that he was liable upon the note, would be a material fact to charge him in a controversy with the holder or indorsee. But it could not change the relative rights and obligations between the partner's themselves. Had Loring given the note of the firm for a carriage and horses for his own use, Smith might have incurred a liability to the holder by a subsequent assent. Yet Loring would have been bound to account to Smith. The cases of subsequent assent, cited by the defendant's counsel, are not between the partners themselves, but between the partners and third persons.

3. The case is considered as one in which payment has been made voluntarily, on an arrangement executed between the parties, and therefore not to be disturbed.

Were this suit brought by Smith against the bank, to recover back the money paid, or to rescind the contract of sale, the arguments urged and authorities cited would apply. But they have no application, as we conceive, as the case stands.

Smith had an undoubted claim against Loring, his partner, and he agrees to give up that claim for no consideration but an agreement, on the part of Loring, to unite in giving up his means to pay the just debts of the firm, upon arrangement advantageous to both. Would such an agreement bind him in a settlement with his partner?

He is partly induced to make this agreement from the circumstance that Loring has the advantage of him, his property being under execution for a debt of the firm, and Loring's free, and partly from an unfounded pretension that he was liable to Loring for an act charged upon him, but actually performed by Loring, would these circumstances furnish any aid to Loring in holding the agreement of Smith as obligatory upon him? *Heathcote v.*

Smith v. Loring.

Crookshanks, 2 Durn. and East. 27; Fileh v. Sutton, 5 East. 231; Harries v. Wilcox, et al. 2 Johns. 448; Seymour v. Minturn, 17 467] Johns. 174. All cited by Mr. Wright are full to the *point that this agreement to give up the claim for the Harlow indorsement can not bar Smith, unless made upon a good consideration. The whole case, we conceive, turns upon that question, which the court must determine on the proof.

m

By the Court:

There is no difficulty about the facts material to the decision of this cause. It is clear that Loring originally indorsed Harlow's note with his own name, and upon his own account, and that he afterward substituted that of the partnership, without the knowledge, authority, or consent of Smith.

We entertain no doubt but, upon this state of facts, Loring was accountable to Smith for any loss sustained by the partnership. The making use of the partnership name to remove his own, was an application of the partnership credit to his separate use. And if pecuniary loss followed, its consequence was an application of the partnership funds to the individual benefit of one of the partners. The power of the partner to do this, by no means includes the right to do it, without being accountable. Wherever a partner binds the partnership for his own private advantage, he is liable to the partnership. No principle is better settled, and it is impossible to conceive how a court of justice could adjudge otherwise.

We can conceive of no course of reasoning, by which an individual indorsement can be distinguished from an individual note. Both create an individual liability for some legal consideration received by the party that incurs it, and the discharge of that liability must be for the benefit of the party liable. The firm of Smith & Loring derived no benefit from their indorsement of Harlow's note, more than they would from paying any other debt due by Loring. The benefit resulted wholly to Loring, the prejudice to the firm.

It is attempted, in argument, to distinguish the two cases, by alleging that it was equally the interest of both partners to sustain Harlow's credit, and that therefore the indorsement was for the 468] benefit of both. But this argument *would more strongly apply to an individual debt of Loring's. The firm would be deeply

Smith v. Loring.

interested in preserving the credit of one of its members; and this might form a reasonable apology for a temporary application of partnership credit or funds to that purpose. But it could be no legal ground for exempting the partner, whose debt was paid, from accounting to the firm for the amount.

It is urged that if the indorsement was made without authority from Smith, it did not bind him, that the payment was, therefore, voluntary on his part, and he can not now recover it back.

As between Smith and the bank, upon the state of facts in this case, there is no doubt this argument would be conclusive. It would be equally so, had the supposed liability been created by Loring, for money, which he actually received and applied to the purchase of a private estate. In that case, we presume, it would scarcely be resorted to. A partner borrows money, and gives for it the note of the firm. With this money he buys a farm, and takes the title to himself. The lender of the money was fully apprised of the fact that it was obtained for private investment, consequently this co-partner was not legally liable. Nevertheless, to avoid controversy, he pays the debt, and takes up the note. Can it be for a moment supposed, that in a settlement between the partners, a court of justice would permit the maker of the note to exempt himself from accountability, by proving that, in point of law, the payment was voluntary, though made upon a liability of his own creating, and in payment of money that he had received and invested? As we view this case, the argument of voluntary payment is the same as it would be in the case supposed.

Upon the whole proof it is clear, that when the settlement was made with the bank, Smith agreed to relinquish his claim against Loring, upon account of this indorsement. And this presents the real and only difficult point in the cause. If this agreement was made upon a good consideration, with a knowledge of his rights, and in circumstances that gave Loring no unfair advantage, it must conclude Smith.

*At the time of the adjustment, when the separate [469 property of the parties was made common stock, and sold to the bank for their mutual and equal advantage, it would seem that Loring's part was of the greatest value. Though Smith gave some equivalent for this, in giving up his claim upon Loring for the original difference of exchange, still the difference in value, in favor of Loring, constituted some consideration. Under ordinary

Smith v. Loring.

circumstances, the adequacy of the consideration is not to be taken into account. In the settlement of partnership affairs, where they settle upon equal terms, and mutually agree to share losses from motives of friendship, and a disposition not to scrutinize each other's conduct too closely, such settlements should not be disturbed, although the liabilities of one might greatly exceed those of the other. And for this reason, the inducement to settle of itself constitutes a good consideration.

But in this case, and when this settlement was made, the parties were not upon equal terms. The property of Smith was under execution for a company debt, which it was equally the duty of Loring to pay. The property of Smith was bound, that of Loring was free. With this advantage in his favor, Loring refuses to make a settlement of the debts of the firm, which all the testimony concurs in describing as advantageous to both Smith and Loring, unless Smith will relinquish this claim upon Loring's own terms. The conduct of Loring, throughout all the negotiations, is that of a man who feels that he has an advantage, and is determined to use it. Loring was, in any event, liable for Harlow's debt, and there could be no justifiable reason for refusing to settle it, and the other debts of the firm, to the mutual benefit of both, without an abandonment on the part of Smith of his claim for compensation. There was no necessary connection between the payment of debts due from the firm, and a settlement of account between the partners. The only conceivable reason for connecting the two subjects would seem to be this: unless I can secure a certain residuum for myself, by a settlement, I will keep all, and let the 470] creditors do their *worst. It is, indeed, in proof that a threat, something in this character, was thrown out.

In the course of these negotiations, Loring steadily refuses to concede anything. He would not give up the award in his favor in the New Orleans affair. Smith was required to give up the debt due from Loring for the difference of exchange, and the liability of Loring for the Harlow indorsement. For these concessions by Smith, Loring would exonerate Smith from an alleged liability in the Sprigman case, which, upon investigation, turns out to be totally groundless, and without color of justice. In the course of Loring, there was no equality or reciprocity of concession. The execution levied on Smith's property seems to have given Loring this advantage over him. It is evident, that in the

Bank of the United States v. Schultz.

negotiations, Smith did not contend upon equal terms. His great anxiety to effect the settlement is even alleged and insisted upon in the answer, as a ground why he should be concluded by it. Smith pressed the settlement; Loring insisted to clog it with conditions.

Every case of this kind must be decided more or less, upon its own circumstances. Three judges only sit in this cause. Two of us are of opinion that connecting the situation of Smith, the conduct of Loring, and the inadequacy of consideration together, they present a proper ground for allowing the relief sought. Upon the first and second points, we all concur in opinion. It is only as to the effect of the settlement that we differ.

Judge SHERMAN dissented.

Judge BURNET did not sit.

*BANK OF THE UNITED STATES v. SCHULTZ.

[471

Court of equity may interfere and enjoin a sale on execution, where, in law, no title would pass.

THIS cause was reserved for decision here, by the Supreme Court of Hamilton county. It was a bill in chancery to enjoin the defendant from selling certain real estate, of which the complainants were in possession, upon an execution at law. The facts of the case are as follows:

On October 12, 1820, C. Schultz recovered a judgment against the Cincinnati Bank, for two thousand six hundred and ninety-eight dollars. Execution was sued out November 8, 1820, and levied on real estate, appraised at four thousand four hundred and fifty-eight dollars, and returned not sold for want of bidders. The same return was made upon several writs of *vendi.*, and on October 7, 1822, the valuation was set aside, and a new valuation being made, the property was finally sold, August 16, 1824, for three hundred and fifty-two dollars and twenty-six cents. The plaintiff, in October, 1824, sued out a new *f. fa.* and caused it to be levied on the prop-

Bank of the United States v. Schultz.

erty in question, which was owned by the Bank of Cincinnati, at the date of the judgment, and sold by them to the complainants, and conveyed on October 17, 1820. The bill assumed that, by the proper construction of the statute of Ohio, the defendant, Schultz, had lost his lien upon the lands, and prayed an injunction to prevent the sale. The defendant demurred to the bill, and the cause came on for hearing upon the demurrer.

STORER, in support of the demurrer, contended:

1. That the court of chancery had no jurisdiction of the case made in the bill. That it was not a bill to remove a cloud cast upon the complainant's title, because the defendant sets up no title, adverse or otherwise. He merely asserts a lien, the creature of the law, and until some person purchases under it, no right exists that a court can take cognizance of.

The right asserted by the complainants is a complete legal right, and can be effectually asserted at law. For if there is a sale effected, 472] the purchaser must institute legal *proceedings to obtain possession, upon which the matter stated in the bill, if available at all as a defense, could be fully used.

A decision upon this bill would not conclude the complainants. If it were dismissed upon hearing, and a sale made, the complainants could still be heard in their defense at law, against the purchaser.

In *Weller v. Smeaton*, 1 Cox. 103, it is laid down that bills of this nature are only sustained in one of two cases: 1. To compel the party to try right. 2. To prevent multiplicity of suits. But where one party claims, and another denies the right, chancery could not interfere. He cited, to the same point, 1 P. Wm. 672; 3 Johns. 566; 2 Johns. Ch. 282.

On principle, however, it is conceived there is no equity in the complainant's bill.

They rely, first, on the statute relating to banks and bankers, as prescribing a course for the creditors of those institutions to pursue, to the exclusion of any other.

To this, it may be briefly and satisfactorily answered, that the remedy referred to was merely cumulative. That the proceedings on which the judgment referred to was rendered were had in the usual course of law, without reference to any special statute. That

the lien was given by the judgment, and did not depend on any process subsequent to its rendition.

They rely, secondly, on the fact that in 1822, a statute was passed, in section 16 of which is contained the following provision: "But if the plaintiff, in any such judgment, shall not within the time aforesaid, cause the levy and appraisement to be set aside, as herein provided, then and in that case, such judgment shall operate only as a lien on such part of the debtor's estate as shall have been levied on." From this section, they draw the conclusion that the lien is not only lost against judgment creditors, but against subsequent purchasers also.

To this we answer, that the complainants are admitted to be purchasers, after the lien was created, by the rendition of the judgment in favor of the defendant. That the statute of 1822 was intended only to refer, and by a fair *construction of its terms, does [473 only relate to *bona fide* judgment creditors; that the defendant's lien was secured to him by the statute in force in 1820, which has no such exceptions as that contended for, as existing in the law of 1822, and being thus vested, can not be destroyed by any subsequent statute on the subject.

On examination, it will be found that every statute which has been in force in Ohio, whether under the territorial or state government, with the exception of that part of section 18 of the law of 1822, which the complainants select as applicable to their case, expressly secure the lien given to judgment creditors, a preference, nevertheless, being secured to subsequent *bona fide* judgment creditors, where the prior creditor, by delay, has forfeited his right. In no case under these statutes, it is believed, was it ever contended that the lien was lost to the judgment creditors in favor of a subsequent purchaser, unless the lapse of five years rendered the lien of no avail; and, perhaps, even this last exception is not sustained by the prevailing opinion of the profession; though, it must be confessed, the reason of the law would seem to sanction the observation in its fullest extent. The nature of a lien on real estate presupposes that the entire control of the legal title is transferred to the judgment which binds it. Like a mortgage, it acts at once on the whole estate on which the judgment is a legal charge; the debtor is divested of his power to alien it, and the conscience of every man is affected by the judgment docketed, for which he is bound to search. It could not be said that the cred-

Bank of the United States v. Schultz.

itor should be confined to a partial lien, when the language of the statute gave him a general one; nor, yet, be compelled to take such portions of the debtor's estate as his security that caprice or interest might offer.

The law of 1822 was enacted under peculiar circumstances. Great commercial embarrassment had prevailed, and the dockets of the courts were crowded with judgments. Levies were made, and creditors were contending for priority. The sheriff had been so frequently required by the debtor to levy on unproductive property, or for small sums on such valuable tracts of land, that no 474] one would purchase *and pay the balance of the appraised value. It was fashionable to estimate real estate at an exorbitant price, and no buyers, of course, were in the market. To prevent some of these inconveniences, and, if possible, to remove them all, we believe, was the object of the statute referred to. In section 2 *the judgment creditor is required to take out execution within one year from the rendition of judgment, and cause the same to be levied, or it shall not operate as a lien to the prejudice of any other bona fide judgment creditor.* This section, it will be seen, is altogether perspective. Section 16 commences with a provision which authorizes the judgment creditor to set aside his levy *within six months after the taking effect of the act, and the court will award a new execution, which the creditor might levy agreeably to the provisions of that act;* and, after such levy, the judgment should not operate as a lien on the residue of the debtor's estate to the prejudice of any *bona fide judgment creditor.*

It then became necessary that some disposition should be made of those judgments where the levy was not set aside, and the section relied on by the complainants then follows. If there is anything in the structure of the sentences in the phrases used, or the apparent object in view on the part of the legislature, it appears clear to us that this second provision merely followed as an appendage to the first, and as no particular mention is made of other judgment creditors, that the intention obviously was so to connect it with the previous sections as to embrace the same persons within the exception that had already been named. To remove all doubt on the subject, it would seem that the subsequent exceptions, in the same section, refer expressly to judgment creditors.

When the complainants purchased the estate levied on, the defendant's judgment was an existing lien upon it. They were then

charged with full notice of this incumbrance. This purchase was made in the year 1820. With what propriety can it be said that they are to be helped by the provisions of the law of 1822? By the statute in force at the time they became the owners of the premises, the judgment operated on those premises as a specific charge. *Now, if the law of 1822 should be construed to [475] extend in its exceptions to purchasers, it must be those who became such after that law has acted. If, by the neglect of the defendant, his lien was lost on the premises in dispute, it could not operate to assist a previous purchaser; more especially, when at the time of the levy on the premises in dispute by the defendant, the law of 1822 was repealed, and a statute similar in its terms to that under which the judgment was originally recovered was in full force. When the debtor aliened the premises to the complainants, his power so to do was controlled by the defendant's judgment; no valid transfer could be made; and if he acquired a new right by the neglect of the defendant to set aside his levy in 1822, he must have subsequently transferred it to the complainants to have completed their title.

Fox, for the bank, contended:

That the court of chancery has jurisdiction of the case, under section 9 of the chancery act of Ohio, 22 Ohio Laws, 77; that under this act, persons having a legal title to and being in possession of land, have a right to institute a suit against any other person setting up a claim thereto. The only question as to the jurisdiction of the court is, does the defendant set up a *claim* to the property. There can be no doubt that the defendant thinks he has a claim, or he would not prosecute his suit.

The objection, that the right of complainants is a legal one, and can therefore be decided at law, is not a valid objection. We admit that, by the rules of the English court of chancery, the bill could not be sustained until the right had been tried at law. But this rule was found to be inconvenient in this country; and the legislature, by the act above referred to, conferred a jurisdiction on the court which it did not before possess. The decisions cited by Mr. Storer are therefore inapplicable.

On the second point, he contended that the defendant had no subsisting lien on the property by virtue of his judgment.

If any such lien does subsist, it is by virtue of the law regu-

Bank of the United States v. Schultz.

lating judgment and executions, passed in 1822; the law of 1820, on the same subject, being absolutely repealed.

476] *It is admitted, that under the law of 1822, the defendant had it in his power to have retained the lien he had acquired by his judgment in 1820, on the lot in dispute; at the same time, it is insisted he has lost that lien by negligence, or by relying on the sufficiency of the property he had already levied upon for the satisfaction of his judgment.

In order to have retained his lien on the lot in dispute, the present defendant was bound by section 16 of the act of 1822, to have made a levy thereon within six months of the taking effect of the act, and it is expressly provided that if the judgment creditor shall not cause his original levy to be set aside as provided for, "*then, and in that case, such judgment shall operate as a lien only on such part of the debtor's estate as shall be levied on.*"

The statute operates as a statute of limitations in fact. The defendant was only required by this act to make his levy within six months, instead of waiting until the property already levied upon should be sold.

As the court remarked, in the case of *McCormack v. Alexander*, 2 Ohio, 74, in the clause of the statute above referred to, "there is nothing doubtful, nothing ambiguous, no words made use of, which operate to defeat the manifest intention of the legislature."

As the court have already decided that the legislature have the power to take away liens and grant them at their pleasure, the law as it is, not as it ought to be, must govern the court. The legislature have declared their will that judgment creditors, in order to retain a lien already given, shall do certain acts. If they see proper to accept of the lien tendered, they must comply with the requisitions of the law.

The fact that the complainants purchased subsequent to the creation of the lien of the defendant's judgment, can have no effect in the decision of the cause; for, if the legislature have the power to take away the lien and have done so, it is perfectly immaterial who has the fee of the property or when it was acquired.

The complainants purchased the lot and paid their money at a time when the judgment debtors had a great sufficiency of real estate (as was supposed) to satisfy the defendant's judgment.

477] *The property first levied upon, was valued at four thousand eight hundred and forty-four dollars, could it have been reasonably

supposed that in two years afterward that same property would have been disposed of for the sum of three hundred and fifty-two dollars. If, therefore, the court are disposed to look at the equity of the cause, as between complainants and defendant, they will find that the parties stand at least on equal grounds.

Again we contend that the law of 1822, is absolutely repealed by the act of 1824, and the repealing law has no saving clause by which the liens of prior judgments are preserved. This last act gives a lien to judgments rendered subsequent to the taking effect of the act, and to those only. The defendant, therefore, can claim no lien whatever at this time, as there is no law giving a lien to judgments rendered in 1820.

Mr. ESTE, on the same side:

The defendant contends:

1. That the complainants have plain, adequate, and complete remedy at law, and, therefore, that the court has no jurisdiction.

2. If the court retain jurisdiction, there is no equity in the bill.

The court has jurisdiction by virtue of its general powers as a court of chancery; and specially, the ninth section of the chancery act.

Its jurisdiction extends to all cases properly cognizable by a court of chancery, in which plain, adequate, and complete remedy can not be had at law. Ch. act, sec. 1.

"When there is a remedy at law, if it is doubtful or difficult, the courts of equity will hold jurisdiction." Cooper's Equity, 129; 1 Vesey, 417; 3 Johns. 590, the same case cited by the defendant's counsel. See also 2 Johns. Ch. 176, same case, and the same authorities there cited. 3 Johns. 605, 607; Livingston v. Van Ingen, 9 Johns. 507; 10 Johns. 587. "Where the remedy at law is doubtful, chancery will relieve." Kent. "I do not say that there was no defense at law, but the remedy was doubtful."

It will be seen, by a reference to the above cases, that chancery will relieve, when plain, adequate, and complete remedy [478 can not be had at law; and when it is doubtful or difficult. In the case in 3 Johns., Judges Van Ness and Kent sustain the bill, because the complainant does not appear to have a clear and adequate remedy at law, although the only question was about legal title.

Bank of the United States v. Schultz.

If the complainants take no step until the sale of the property, will the remedy at law be plain, adequate, and complete, free from doubt and difficulty?

They are admitted to be in possession, under a valid legal title. The defendant sets up no claim other than the alleged lien of the judgment against the Cincinnati Bank, and that this court is perfectly competent to decide on the nature, extent, and effect of the lien, there can be no doubt.

In the case in 9 Johns., Judge Kent not only states the power of the court to determine a question of law, but in direct and strong terms represents the absurdity of sending a mere question of law to the common law side of the court, when the judges before whom it is to be tried are members of the same court, etc. After the sale, they can not prevent the court, if the proceedings be regular, from ordering a deed to the purchaser, and then, by the summary law of unlawful detainer, he may obtain the possession, and compel the complainants to bring their ejectment. And even a trial in ejectment will not be final. If the principle contended for by the defendant, be correct, the possession may be shifted before the title can be tried. To turn a man out of possession, under color of law, and give all the advantage possession gives, in trying title, compel him to bring his ejectment, to subject himself to the expense, delay, and vexation of a long, difficult, and doubtful contest, and then tell him that his remedy is plain, adequate, and complete, is an abuse of terms.

It is expressly provided, in the ninth section of the chancery act, that a person having both the legal title, and the possession of land, may institute a suit against any other person setting up a claim thereto, etc.

The complainants have both the legal title and possession. The defendant claims to have a lien on the land, secured by actual levy. The defendant's counsel, who questions the jurisdiction, has 479] given this part of the case a very slight consideration. He contends that the dismissal of the bill would settle no legal right; and, therefore, that the complainants ask a vain thing. The force of this argument is not perceived. This question is, whether the lien asserted, reduced to levy, constitutes a claim on the land, within the spirit of the law. The object of the law was to enable a person, having the possession and legal title, to quiet himself

 Bank of the United States v. Schultz.

against all claims that might be set up against the land, whether as direct claims of title, or of incumbrances.

What good reason can be assigned why the possessor of a tract of land, holding the legal title, should not be permitted to quiet a judgment claim as well as any other? Can he improve with more safety, sell with less difficulty, or have less anxiety than if it were a mortgage?

The lien is a claim and charge on the land, and if pursued to execution, levy, and sale, the purchaser will have a *legal claim of title*. Then, beyond dispute, the complainants could file their bill. Why delay them for that event? The question then will be, lien or no lien? This is the only question now. Dismiss the bill, and what is the situation of the complainants? They must either satisfy the judgment, permit it to remain to the prejudice of their title, or suffer the property to be sold.

But if the court has jurisdiction, it is contended that the complainants have no equity. In other words, that the judgment of Schultz was a lien on the lot at the time of the sale to the Bank of the United States, and so continues.

One of the defendant's counsel has said that "the right of the judgment creditor is the creature of the law, and that a court of equity can give no assistance to perfect his lien. It grows out of a statutory provision; it is altogether dependent on the statute for its validity; it is limited by statute, and can only be *specifically enforced in the manner pointed out by the statute*." By the statute, then, let us abide. The complainants contend that the judgment of Schultz *never was a lien, and if it were, it no longer exists*.

On February 25, 1820, 18 Ohio L. 180, the judgment and execution law, under which Schultz's judgment was rendered, was passed, and took effect *June following. It contains the same general provision subjecting the lands, etc., of the debtor, to a lien. This statute, without other legislation, might be said to embrace the debts of banks as well as individuals; but at the same session, on the 18th of the same month, to take effect on the 1st of June following, an act was passed to regulate proceedings against banks and bankers, which, by fair construction, makes an exception. By this law, section 2, it is provided that a writ of *fi. fa.* (only) shall be the first process, and directing the officer to levy only on personal property, and no authority, in any case, is given to levy on lands. Had the legislature stopped here, it might be said that

Bank of the United States v. Schultz.

it did not appear sufficiently clear that they intended to form an exception. But at the next session a law was passed, to take effect March 1, 1821, declaring that, in *all cases* where judgments *had been* or should be rendered, the plaintiff might proceed under the law of 1820, *or he might issue a fi. fa. et lev. fa.*, and on return of no goods, etc., proceed to levy on the real estate of the bank, but *no interest whatever* of the defendant would be conveyed that *was not in him at the time of the levy*. In January 28, 1825, 22 Ohio L. 358, an act was passed expressly limiting the lien *to the date of the levy*, and repealing all other laws on the same subject. If there be any weight in the argument that the remedy given by the law of 1820 was merely cumulative, it does not apply to the law of 1821, *for judgments, in all cases when judgments had been or should be rendered, are embraced*. And his election is given him whether to proceed and enforce the collection of his judgment, under the statute of 1820, or to issue his *fi. fa. et lev. fa.* If the latter, on failure of personal estate, it shall be the further duty of the officer to levy on lands, etc., which such bank may hold by deed in fee simple, etc., and to sell the same, under the restriction and limitation herein-after mentioned; and on sale to make to the purchaser a deed therefor, therein and thereby conveying to him, etc., all the right which such bank, etc., had in or to the property sold *at the time the same was levied upon*. By section 2 the same reservation is made when any person holds lands in trust for the bank; and by section 3 they are required to proceed to appraise ^{*}and sell, "in the manner pointed out for the sale of real estate, under the provisions of the act regulating judgments and executions."

The last section authorizes to proceed under either or both the acts of 1820 or 1821, until his judgment is satisfied. The same provisions are substantially contained in the law of 1824, taking effect from its passage. The levy not being made until about four years after the sale to the complainants, *no lien ever attached*.

But if the judgment against the Cincinnati Bank were a lien from the commencement of the term in which it was rendered, it did *not continue until the levy in 1824, but ceased to exist by the operation of the judgment and execution law of 1822, after December 1, 1822*.

In 1820 a levy was made on sundry lots valued at four thousand eight hundred and fifty-four dollars. They were appraised, and several times advertised and offered at sheriff's sale, to be sold,

Bank of the United States v. Schultz.

and in October, 1822, the valuation was set aside, and the levy remained. In June, 1824, a *ven. ex.* issued and sold in August. In September, a *fi. fa. et lev. fa.* issued for the residue, and a levy was made on the lot in controversy. By the judgment and execution law of February, 1822, in force June 1 of the same year, 21 Ohio L., sec. 16, p. 69, when lands had been taken in execution, and twice offered, the *levy and appraisement* might, at any time before December 1, 1822, be set aside on motion, and a new levy made on such property as the plaintiff might deem sufficient, and the lien of the judgment ceased on the residue of the estate as to any other judgment creditor. But if the *levy, etc.*, were not set aside within six months, viz: by December 1, 1822, *the lien remained only on the property levied on.* The plaintiff was presumed to be entirely satisfied with the levy; the limitation fixed, within which to make up his opinion, expired. The lien was absolutely gone, and the judgment debtor at liberty to sell his real estate not levied on, free from the incumbrance of the judgment. If the statute receive a literal construction, then the conclusion is inevitable that the lien ceased to exist after December 1, 1822, on all the real estate of the Cincinnati Bank, except the lots levied on.

*But the defendant's counsel insist that the limitations and [482 restrictions imposed on him by the act of 1822 were intended to apply *exclusively* to other judgment creditors, and that in no state of the case could a judgment debtor sell his land free of the incumbrance of an existing judgment. And if he could, as the judgment was rendered in 1820, the law of 1822 could not affect it.

The general intention of the legislature in passing the law of 1822 was to limit the duration of existing and subsequent liens. Unnecessary oppression to the debtor, and injustice to junior judgment creditors, are the necessary results of general and long-continued liens; so much so that general liens are said to be "odious in the law."

In all the New England states, in Kentucky, and indeed in a majority of the states, a general lien of a judgment is unknown. There is no lien until levy, and then only on the property levied on. In these states, where the judgment operates as a general lien, it has from time to time been limited by statute, restrained in its operation by judicial construction, and relief frequently afforded in equity. In the case of the Bank of N. America v.

Bank of the United States v. Schultz.

Fitzsimons, 3 Binney, 361, the judges argue strongly in favor of the policy of limiting the liens of judgments, and specify the many abuses growing out of their continuance. The knowledge of many actual abuses, and of probable future mischiefs, no doubt induced the legislature to pass the limitation act of 1822.

By this law this intention of limitation is clearly expressed. In section 16 all cases of then existing liens were supposed to be enumerated, and the time limited for their duration.

1. When there had been a levy and appraisement, and two attempts to sell, if the plaintiff thought he had not sufficient to secure him, even at two-thirds of a valuation, he had the privilege of setting aside his levy, etc., and of levying on as much of the defendant's property as he pleased, any time within six months. If he did this, the judgment operated as a lien on the residue of the debtor's estate, to the prejudice of any other *bona fide* judgment creditor.

483] *2. If the plaintiffs were satisfied with his levy and appraisement, and did not choose to set them aside in six months, "then, and in that case, such judgment shall operate as a lien only on such part of the debtor's estate as shall have been levied on."

3. When no levy had been made, it was authorized to be made in six months, and no lien to exist on the residue of the estate after the levy.

4. And lastly, no judgment, heretofore rendered, on which execution should not be taken out, and levied within a year, should operate as a lien on the estate of the debtor, to the prejudice of any other *bona fide* creditor.

Having thus provided for all the liens of judgments existing, or to come, and providing further, that the judgments shall all be collected agreeably to the provisions of that act, the legislature repealed, without qualification, all other laws on the subject.

The defendant's counsel misconceive, when they suppose that we contend that the law of 1822 created the lien, except as to future judgments. We view it as intending to limit, and actually limiting all old liens, and providing, and intending to provide, for every possible case of existing liens; and we think those cases not expressly enumerated, are embraced by fair construction and necessary implication. Their argument, therefore, on this branch of the case can not apply. It is urged, that inasmuch as no previous legislature had limited the incumbrance, so as to permit the debtor

Bank of the United States v. Schultz.

to sell, and as in the act of 1822, the first, third, and fourth classes of cases in section 16, and all future judgments, are limited, only in favor of other judgment creditors, therefore the limit is to be confined to them in the second class. The language is clear, explicit, and positive. The classes of cases are as distinctly marked, and the intention as manifest, as if they had been in different sections. Examine, and compare, and conceive if you can, how the intention to remove the lien altogether could have been more clearly expressed. "*Then and in that case*," contradistinguishing it from the preceding, and from all other cases "such judgment shall operate as a lien *only*, on such part of the debtor's estate as shall have been levied on." In the first class, * "shall not operate as a lien, [484 etc., to the prejudice," etc. So of the third and fourth. If it had been intended to limit the lien as in other cases, why not only omit the important words, "to the prejudice," etc., but so construct the sentence as not to admit of their insertion. The attempt to consider the section 16 as providing for two classes only, and so connecting them as to subject them to the same qualification, will not answer. Four classes are named, and all possible cases, agreeably to the spirit, intent, and general policy of the law, embraced. A general lien existed. It was inconvenient and injurious. It was intended to get rid of it, and yet, in such a way, as to give to creditors an opportunity, by the exercise of proper diligence, to secure themselves. It was limited under certain conditions and restrictions, "but," if you do not comply, the limitation, in one state of the case, is absolute. If you are not satisfied with your *levy and appraisal*, set them aside any time within six months, and make a new levy; and from the time you *levy, before any appraisal takes place*, you shall cease to have a lien, to the prejudice of any other judgment creditor. "But," if you are entirely satisfied with your *levy and appraisal*, if you feel quite safe, and do not choose to set them aside, etc., *then your lien shall cease altogether, except on the lands already levied on and appraised*.

This court never will construe the lien as extending to the *residue of the debtor's estate*, in the class of cases specified, in favor of judgment creditors, because the word *purchasers* is not named.

In the case of the Bank of N. A. v. Fitzsimons, before referred to, the law of 1791, cited in a subsequent limitation act, makes no limitation of a judgment, but the mischiefs of continuing the liens of judgments are set forth in the preamble. "It is said whereby

Bank of the United States v. Schults.

defendants as well as *subsequent purchasers* of real property suffer much vexation," etc. The court [*vide* pages 361-355] *extend* all the privileges to *judgment creditors*, although they are not named. And by the law of 1822, by fair argument, *and in all the other classes* (*viz*: first, third, fourth, etc.), after real estate had been levied on, appraised, and twice offered, and the judgment 485] creditor would not, in a *reasonable time*, move to set *aside* his valuation, he should *lose his lien altogether, as well against purchasers* as against judgment debtors. It would be fairly carrying into effect the intention of the legislature, in remedying the mischiefs intended to be provided against; and this view of the subject is aided by the latter part of section 16. After enumerating the classes specified, "and in all cases," as well those enumerated, except No. 2, as all other cases, those enumerated by defendant's counsel, and all others, if any existed, "where real estate *has been* or may hereafter be taken in *execution and appraised, and twice advertised and offered for sale*, and shall remain unsold for want of bidders, it *shall* be the duty of the court, on motion of the plaintiff, to set aside the inquest and appraisement so made, and on a subsequent execution, the estate, etc., shall be appraised and sold according to the provisions of this act." Now, I maintain that a fair consideration of this provision, connected with class No. 2, in section 16, will legitimately lead to the conclusion: that *in all cases whatsoever*, where real estate had been taken in execution, *appraised, and twice offered for sale*, and the party did not set aside his inquest and appraisement within six months, or at farthest one year afterward (but I would say, by fair limitation, *six months*), his lien was absolutely gone on the residue of the debtor's estate. In all the cases, except class No. 2, in section 16, and in all judgments thereafter to be rendered, if the plaintiff complied with the law, he lost his lien on the residue of the debtor's estate from the moment of his levy, and to all other judgment creditors; but retained it as against purchasers. How long? For two, ten, or twenty years? As long as he pleased? By no means. Relief of the debtor from unnecessary oppression, protection of the fair purchaser for a valuable consideration, come not only within the spirit, but within the fair construction of the letter of the law.

In *all cases whatsoever* it was provided that the plaintiff should *levy to his satisfaction*. In cases when he had levied and made two or more offers to sell, if dissatisfied with his levy, he could it aside

Bank of the United States v. Schultz.

and enlarge it. If he had levied, and had not offered it twice, etc., he could unquestionably, by making use of due diligence, have two offers, *and move to set aside his levy and enlarge it. [486 If he had not levied, he could levy until satisfied. So as to future judgments. It is manifest, therefore, that to prevent all cause of complaint from judgment creditors, permission and time were afforded to carve for themselves. This done, other judgment creditors might levy, free of lien, on the residue, etc., and so on: The levy made, what next? Is all this provision made that the plaintiff, after having taken his choice of quantity and quality, be permitted to lie still at pleasure? *Then* he is to proceed in *all respects* to pursue his levy under that act. He must proceed *immediately to appraise, advertise, etc.* Having proceeded with all reasonable diligence to offer the land levied on *twice*, after appraisal, if he do not *then*, under the latter part of section 16, set aside his appraisal, and obtain a revaluation within six months, he places himself in the situation of judgment creditor in class No. 2. He *loses his lien on the residue of the estate*. The express and positive limitation, then, *as to him*, the provision in the latter part of section 16, in a *given state of case* as to *all others*, show as clearly that the legislature intended to provide that the lien should absolutely cease to exist on the residue of the debtor's estate, except the property levied on, as they intended to provide that the lien should cease to exist *from the date of the levy*, on the residue of his estate against other judgment creditors. There is good reason why full effect should be given to the plain import of the words of the legislature in the second class of section 16. Where a creditor has sufficient time and notice given him to set aside and enlarge his levy on a valuation, on which two attempts to sell have failed, two-thirds of which is more than sufficient to satisfy his whole claim, it is unreasonable and oppressive to tie up the hands of the debtor, and prevent him from selling his other lands for a fair consideration. He is indebted to those who have not sued him. He can not pay them, nor can he dispose of his lands to pay them. He must be sued, harassed, and subjected to accumulated interest and costs, and *then the judgment creditor* may take the residue of his land unincumbered. Other mischiefs might be enumerated, and yet the court are asked to depart from the plain letter of the law *in violation of the policy of the act, and of *public* [487 *policy*, to leave them in full operation on society. If the court de-

part in *the least* from the *letter*, they will rather embrace in *all the limitations purchasers for a valuable consideration* than exclude them. If the law were doubtful, the court would seize upon it in favor of the fair purchaser and general policy. How, then, when the language is clear and explicit, can it be supposed that the purchaser will be set aside? It is further urged, that as the judgment was a lien in 1820, although it ceased to exist by the law of 1822, yet, as the conveyance of the Cincinnati Bank was during the existence of the lien, the deed must be considered void, and before the complainants could acquire any title, it should be shown that there was a conveyance *since* the expiration of the time to set aside the levy in 1822. The defendant's counsel have certainly made a judgment lien accommodate itself to their wishes. When the jurisdiction of the court is assailed, it sets so loosely as to constitute *no claim* on the land. Again, it is made to fasten so closely as that nothing can separate it. It forms an exception to all subjects of limitation. During life no right can be acquired that can survive it, and after death it may be revived at pleasure, to reach back to its birth with all its power.

The law of 1824, it is said, *revives the lien*. The words of the counsel are, "This limitation of a lien of a previous judgment is abrogated by the act of 1824, and the *lien restored in general terms, in all cases when execution was sued out in twelve months*. The power thus to restore the lien, when it affected no rights acquired in the meantime, certainly existed in the legislature, and the complainants acquired no rights under the law of 1822.

It is admitted in this argument, that under the law of 1822, the lien was taken away. It is affirmed that the conveyance made to the complainants before that time, did not place them in a situation to acquire *any right* by the operation of that law, which the legislature *did not* and *could not* destroy by the act of 1824.

The whole of this argument is unsound.

The law of 1824 did not restore the lien which had expired, and 488] the complainant did acquire rights under the law *of 1822, which the legislature *could not constitutionally deprive them of, if it did restore the lien*.

In 1824, when the statutes were revived, the time having elapsed, by the law of 1822, for all judgment creditors prior to that time to secure their liens, and the legal presumption being that they had complied with the law, and presuming, also, that subsequent

judgment creditors had levied within a year, it was enacted, "That no judgment heretofore rendered, or which hereafter may be rendered, on which execution shall not have been taken out, and levied within the expiration of one year, after the rendition of such judgment, shall operate as a lien on the residue of the debtor's estate, to the prejudice of any other *bona fide* judgment creditor."

But if the legislature did take away a lien, secured under the act of 1822, not levied within a year after the date of the judgment, did it *revive the lien which had expired, because an execution had been issued within twelve months from date?* From this, it is inferred that every judgment levied *within a year* is a lien, *as well before as after 1822*. This inference could only be correct if the law of 1822 *had never passed*. Then the law of 1824 would have been the *first limitation act*. By the law of 1822, the lien was not merely suspended, it did not remain dormant, but it became extinct. In the language of Judge Breckenridge, it was "gone to all intents and purposes." When, therefore, the legislature say, "no judgment heretofore rendered, on which execution shall not," etc., refers to the law of 1822, and from that prospectively; and so far from intending to revive liens limited under that act, it intends to prevent revival or extension; to leave the old judgments as limited by 1822; to continue in force the lien of those since rendered, if levied within a year, as in that law provided, and to continue the limitation of future judgments to the same period. If, however, the act of 1824 should be so understood as to take away liens secured under the act of 1822, it follows conclusively, from the above remarks, that it did not intend to *revive them*. Revive! When is the lien treated as dormant? The counsel have been driven to the necessity of giving color to an untenable position, to use the terms "temporary suspension," "temporary removal," and to assimilate it to *revived judgment lien*. You [489] may *revive a dormant lien* by reviving a dormant judgment, *provided that the lien necessarily attaches to the judgment*. But if the lien be once severed, once destroyed, it never can again attach, except by legislative enactment, and I would add, *prospectively*. "A judgment revived by *sci. fa.* revives the lien of the original judgment, with all its incidents and powers." Not so, since the limitation act of 1822, if it be intended to say that it revives a judgment *prior to that time, with the lien it had at the time it was rendered*. It revives it only with the lien incidental to it, at the time it became

 Bank of the United States v. Schultz.

dormant, if any lien can now be said to be an incident of a dormant judgment. If the lien had been lost before revival, it was no longer an incident to the judgment, and the revival of the judgment no more revives the lien, than if the lien had never existed.

A lien is not *necessarily an incident* of a judgment. When a law, then, takes away a lien, and another law authorizes the revival of an unsatisfied judgment, how does it follow that the removal lien attaches to it? It could easily be shown, if necessary, that no lien whatever is incidental to a judgment, since the limitations of 1822, which judgment requires revival by the five years' law. We hasten, however, to a conclusion, and without stopping to inquire into the power of the legislature, as contended for, which we by no means admit. For we insist, it would be equally a violation of right to take it away, whether it was acquired before or after the destruction of the lien. Our case comes clearly within the counsel's own exclusion of legislative power, viz: "Where a right acquired in the meantime is affected." For we did acquire rights under the law of 1822, which a revival of the lien would impair. By a non-compliance of the defendant with the conditions of the law of 1822, our title, previously incumbered, was freed from that incumbrance. To us, it was equivalent to satisfaction of the judgment. We could enjoy, improve, or sell, clear of incumbrance. By the neglect of the defendant, and the operation of law, then the lien was removed, and we acquired a positive right to hold and alien, discharged from it. As for the argument of infringing on vested rights, as contended for by one of the counsel, 490] it can have no place here. None are infringed or *intended to be. The most liberal offers were made to the defendant to help himself. He was either satisfied, or slept on his rights. As asserted by Judge Breckenridge, in the case before cited, it "involves an inconsistency to suppose that the act did not embrace judgments already rendered, and contends for the exoneration of the property from the lien to all intents and purposes. He admits that the statute has a retrospective effect, but says there can be no unconstitutional objection to the power of the legislature, to enjoin such conditions as may let in the rights of others. A principle of the artificial system of the law gave the lien, and the law may think proper to dissolve it. '*Omni solvitur eo ligamine quo ligatur.*'" See also the case of McCormick, 2 Ohio.

EWING and HAMMOND, in reply :

Upon the facts in this case, the complainants insist that the defendant has lost his lien. And they ground themselves upon two positions :

1. As the levy was not set aside conformable to section 16 of the act of February 1, 1822 the lien upon all the debtor's lands, except those levied upon, was lost.

2. No lien is reserved for previous judgments by the act of February 4, 1824, which repealed all previous laws.

Section 16 of the act of 1822, contains two provisions in relation to two distinct cases of judgments theretofore rendered : one where execution had been sued out and levied upon land, which had twice been offered for sale, and returned unsold ; the other, where no execution had been sued out at all.

In the first case, the court are directed to set aside the appraisement and levy, if application be made to that effect by the plaintiff, within six months from the taking effect of the act. This being done, a new execution may issue, and a new levy be made. And if, upon the return, the property levied on be appraised at one-third more than the debt, the lien, as to the residue of the debtor's estate, shall cease as to every other *bona fide* creditor by judgment. "*But*," the act proceeds, if this be not done, "such judgment shall operate only as a lien on such part of the debtor's estate as shall be levied on."

*In the second case, that is, where no execution has been [491 taken out, it is made lawful to sue out execution within six months from the taking effect of the act. After which, upon the same principles, as in the other case, the lien was at an end, as to the debtor's other estate, to the prejudice of any other *bona fide* judgment debtor. And it is further provided, that no judgment heretofore rendered shall operate as a lien upon the debtor's lands, against any other judgment creditor, unless execution be taken out within twelve months from the taking effect of the law.

The object of this act is to settle the priority of lien between judgment creditors, and to determine the continuance and termination of the lien between judgments. The previous law, that of 1820, had given a general lien. This limited that lien, not as to the debtor or purchasers from him, but as to judgments only. The complainants attempt to separate a part of a sentence from its connection and context, and give it a meaning inconsistent with both

Bank of the United States v. Schultz.

connection and context. Where land has been levied upon, and twice offered for sale, a certain proceeding may be had from which this consequence is to result, that is, the lien, as against a judgment creditor, shall be limited to the land levied on. "*But*," which is the same thing as to say *nevertheless*, in the case stated, and as between the same parties, if this proceeding be not had, the lien shall be confined to the property levied upon. It would seem to be a violation of all sound construction, to interpret the word *but*, so famous for its character and qualification and negation, and used uniformly to introduce the minor proposition, in logic, as an enlargement of what preceded it in the same sentence. If the levy be set aside, and a new one made, the existing lien shall operate only upon the lands levied, as against other judgment creditors. "*But*," if this be not done, the existing lien shall be limited to the lands first levied upon. Because the words, "other judgment creditors," are not here repeated, it is maintained that this "*but*," extends the limitation to the case of purchasers. We insist that this can only be done by inserting additional terms, introducing a new class of creditors; especially a class nowhere provided for in the whole law.

492] *The next case provided for, is that of judgments upon which no execution has issued. On these, executions, if taken out and levied within six months, shall also, in the case stated, limit the lien, as between judgment creditors. "*And*," not "*but*," in such case if no execution be taken out in twelve months, the lien shall not operate at all to the prejudice of a judgment creditor.

This act, taken altogether, is a curious one, very defective, and somewhat unjust in its provisions. The creditor who has been so diligent as to sue out and levy his execution, and procure the land to be twice offered for sale, is limited, in his lien, to the land levied on, unless he set aside his own proceedings, at his own expense, and sue a new execution within six months. And, according to the interpretation claimed by the complainants, if he do not incur expense, as the penalty for his diligence, he loses his lien against everybody, except the subject levied on. The creditor, who has sued out no execution at all, holds his entire lien for twelve months, and then loses it only as against a judgment creditor! This ought not to be. It never could have been the intention of the legislature. The absurdity is glaring enough as it must stand. It ought not to be increased by construction, and

made to mean what the letter does not call for, and embrace a class of creditors to which no part of the act applies. It comes fairly within the rule laid down by this court, in *McCormick v. Alexander*, 2 Ohio, 74. "Where there is anything doubtful in a statute, it is the duty of a court, in expounding it, to give it such construction as will comport with what is supposed to have been the intention of the enacting power. And where the intention is manifest, but that intention is in part defeated, by the use of some particular *word or phrase*, the court will look to the intention rather than the words."

These remarks were applied to the statute of 1824. In the case under consideration they are strictly applicable. They prescribe the rule by which this section should be interpreted. To be sure, there is no "*word or phrase*," which imposes upon the court, the construction set up by the complainants. They are called upon to construe general terms, used in reference to particular subjects, in a *universal sense, so as to introduce totally new cases [493 and parties, for which, and for whom the act never was intended to make provision, and does, in no other part of it, make any provision whatever.

The counsel on the other side treat this question as if the act of 1822 created the lien. As if we founded our claim upon that law. They forget that it is introduced by themselves, to limit our previous existing rights. They certainly err when they assert that the sentence of the law they rely upon, has no connection with other provisions of the law. This we have already shown. But they go further. They say we must maintain our lien on the act of 1822, because the act of 1820 is repealed, without a saving clause, by the act of 1822; and this act, they add, is repealed by that of 1824. And both these acts are held to be prospective. If this argument be correct, no judgment rendered previous to the taking off of the act of 1824, can operate as a lien, or indeed be enforced except by action of debt.

Section 16 of the act of 1822 contains all in that act that relates to previous judgments. It authorizes executions in but two cases, in terms, upon previous judgments; one where the levy was set aside after two attempts to sell; the other where no execution had been taken out, but should be taken out within six months from the taking effect of the act. By implication it would seem to authorize proceeding to sell upon the old levy in the first case, and

Bank of the United States v. Schultz.

to take out execution within twelve months in the second. But many cases may and do exist of previous judgments, which this section does not embrace—we enumerate some of them: where execution has been sued out, but not levied; has been levied, but no attempt to sell; or where, upon a levy, there has been one attempt to sell. Section 16 can not embrace any of those cases, and upon the opposite argument, there can be no proceeding by execution; the act of 1820 is repealed, that of 1822 prospective. The act of 1824 contains no provisions as to judgments theretofore rendered, except that of section 17, taking away the lien as against another judgment creditor, where execution has not been sued out in twelve 494] months. If this act be prospective, then no proceeding can be had upon any previous judgment, if the opposite argument be sound. This consequence, and the universal practice to the contrary, show that it is unsound. Section 2 of the act of 1824 continues the lien secured by previous judgments, and creates it as to those subsequent. And all the subsequent provisions apply to existing judgments and executions without regard to dates. The complainants, therefore, can not sustain either of the grounds on which they rely.

Supposing, however, that they are correct in their interpretation of section 16 of the act of 1822, that it limited our lien to the lands levied on, because we did not set aside our levy at our own expense, what right did the plaintiffs acquire from that result? It is to be recollected that this limitation of the lien of a previous judgment is abrogated by the act of 1824, and the lien restored, in general terms, in all cases where execution was sued out in twelve months. The power thus to restore the lien, where it affected no rights acquired in the meantime, certainly existed in the legislature. In the case of *McCormick v. Alexander*, before cited, the court decide that this lien is the mere creature of the law, and may be given or taken away at discretion. Now the complainants acquired no right under the act of 1822. When they made their purchase in 1820, they purchased subject to this lien. The subsequent law and proceedings of the defendant operated nothing upon the rights of the complainants. The temporary removal of the lien vested no new interest in them, no new right accrued in virtue of any contract made in faith of an existing law, and the restoration of the lien violated no vested right. It left the complainants where they placed themselves by their contract, and consequently could not impair that contract.

 Admin's of Hough v. Hunt.

This court have decided that land acquired after a judgment is not subject to the lien. By the same rule, lands subject to the lien, are not exonerated by a temporary suspension of that lien, unless in respect to rights originated during that suspension. A judgment revived by *sci. fa.* revives the lien of the original judgment. It is revived in all its incidents, and with all its powers. So the restoration of the lien in this case, suppose *it to have been lost, [495 gives it operative effect from its original date. We conceive that upon a just view of the whole case the rights of the parties remain as they were when the complainants made their purchase, and that the lands in question are liable to our execution. Upon the other point of the cause, that of jurisdiction, we deem it unnecessary to add anything to the argument of Mr. Storer.

The enactments in respect to judicial proceedings against banks and bankers are referred to by one of the complainants' counsel. But they have certainly no bearing on the case. They were intended to be, and are cumulative remedies. Schultz was not bound to proceed under them, and did not so proceed. His case stands as it would have stood had those laws never been passed.

The court were unanimously of opinion that a court of equity might properly interfere to prevent a sale of land upon execution, where such sale would not at law confer a title on the purchaser. And its only consequence would be to embarrass the title of the complainants. Upon the merits of the case arising on the construction of the provisions of the statutes, the court were equally divided in opinion. Consequently the bill was dismissed.†

 ADMINISTRATORS OF BENJAMIN HOUGH v. JOHN W. HUNT.

Where a person deeply in debt, to obtain a loan of money, agrees to purchase a tract of land, at more than double its value, in connection with the loan, and gives a mortgage upon other property to secure the loan and part of the purchase money, the vendor being apprised of the purchaser's necessities, equity will rescind the contract.

THIS case was reserved for decision here, by the Supreme Court

†NOTE BY THE EDITOR.—Reaffirmed, iii. 73; v. 48, 178; S. P. xvi. 574.

Adm'rs of Hough v. Hunt.

of Ross county. It was a bill in chancery, asking relief against a contract for the purchase of a tract of land, by Hough from Hunt, upon the ground of advantage being taken of the necessities of the complainants' intestate, and unfair practices in respect to the contract. The facts of the case were as follows:

In September, 1818, Hough, the intestate, being pressed for money to pay a debt due from him to the Branch Bank of the United States at Lexington, applied to the defendant for a loan of money to make that payment, about two thousand six hundred [496] dollars. Hunt made an agreement with *Hough, to make him a loan of ten thousand dollars, upon condition that Hough would buy of him five hundred and ninety-three acres of land, near Chillicothe, where Hough resided, at twenty dollars per acre. Hough assented to these terms, and received, by way of loan, two thousand six hundred dollars.

The price of the land, and the money advanced, amounted to fourteen thousand four hundred and seventy-five dollars. Hough gave his three separate notes to Hunt, dated September 15, 1818, for four thousand eight hundred and twenty-five dollars each; one payable September 15, 1819; one December 15, 1819; one March 15, 1820. In November, 1818, Hunt gave the intestate a bond to convey the five hundred and ninety-three acres of land, upon the payment of the two last notes. At the time of taking the notes, he took from Hough a mortgage on a separate valuable tract of land to secure the payment of the first note, due September, 1819, which was given in part for the money borrowed, and in part for the purchase money of the land. The balance of the loan of ten thousand dollars, beyond the two thousand six hundred, was never advanced, Hough not being able to give such security as was required by Hunt. Hough died on September 4, 1819. Judgments were obtained on all the notes against Hough's administrators, and also upon the mortgage. Hunt knew of Hough's embarrassments at the time of the contract, and the land purchased at twenty dollars per acre was proved by several witnesses to have not been worth half that sum. The bill prayed that the contract of purchase might be canceled, and the mortgage discharged by the payment of the two thousand six hundred dollars loaned, with interest.

GRIMKE, for complainants:

Whatever may once have been the fluctuation and contradiction in the opinions delivered by the English chancellors, the law of that court appears to be now settled that gross inadequacy of price may be a sufficient ground for rescinding a contract; and it is not true that the only use to be made of it is as a shield of defense. It is true, in the case of *Day v. Newman*, cited by Sir Samuel Romilly, 10 *Ves. 300, the cross bills of both vendor [497 and purchaser were dismissed; but the inadequacy does not seem to have been such (one-half the value) as is intrinsically indicative of fraud. In *Knott v. Hill*, 2 Vern. 26, it was ruled that the purchase of an estate in remainder, from an heir, was void, in consequence of the inadequacy, *though the purchaser knew the risk of getting nothing, if the heir died first.*

In *Wiseman v. Beadle*, 2 Vern. 121, the same principle was declared; although the purchaser run the same hazard of getting nothing, if the vendor should die before his uncle.

In *Ivisleton v. Griffith*, 1 P. Wms., an unconscionable bargain was rescinded, although there, also, the purchaser labored under the disadvantage of getting nothing on a certain contingency.

In *Bough v. Price*, 3 Wilson, 320, the court afforded relief, *although the deeds were actually executed*, and the contract no longer remained in fieri.

In *Gwynne v. Heaton*, 1 Br. Ch. Cas. 1, although the sale was by a young man, of a reversionary interest after the death of his father, the court declared that they rescinded not in consequence of this circumstance, but on the ground of inadequacy.

In *Gartside v. Itherwood*, 1 Br. Ch. Cas. 558, the same relief was afforded. There was no distress on the side of the seller, and yet the inadequacy of price, as affording in itself intrinsic evidence of fraud, was deemed sufficient to overthrow the agreement, and the bargain was accordingly canceled.

In *Underhill v. Horwood*, 10 Ves. 211, Lord Eldon says that "if the terms are so extremely inadequate, as to satisfy the conscience of the court, that there must have been that pressure upon the distress of the purchaser, which, in the view of this court, amounts to oppression, it would relieve."

In *Morse v. Royal*, 12 Ves. 355, Lord Eldon found great difficulty in sustaining the sale, although the vendor was not in embarrassed circumstances, *and had confirmed the contract.*

Adm'rs of Hough v. Hunt.

In *Richett v. Loggove*, 14 Ves. 214, the chancellor afforded relief, *although conveyances had been actually executed*, *on the ground of inadequacy. And, in the case of *Purcell v. McNamara*, 14 Ves. 91, he went equally far.

There is, says Mr. Powell, *Contract*, part 2, 158, a great opinion, Lord Thurlow's, that inadequacy of price, *per se*, shall be sufficient to rescind, as affording self-evident demonstration of unfair advantage and fraud. Only see the lengths to which the courts have gone, in setting aside even *contracts executed*, and regarding inadequacy to be as much an ingredient of fraud, where the sale is *by auction*, as where it is by private agreement. Sugden, 170.

The true rule is laid down in 2 Johns. Ch. Cas. 1, by Kent, who says that inadequacy alone will not be sufficient to rescind, unless it amounts to gross inadequacy; and in that case, the conveyance had been actually executed. And as there must be some definite rule, by which to determine when the consideration is grossly inadequate, the English court of chancery have lately determined that *one-half the value*, where the bill is filed by the vendor, does not constitute that gross inadequacy. *Masheen v. Cote*, cited by Mr. Maddock, 1 vol. 214.

In 2 Atkyns, 134, Lord Hardwicke relieved, although neither of the parties were apprised of the value.

It may be asserted that inadequacy affords grounds for relief only because it is proof of fraud; and if fraud is positively disproved, if the mere presumption which arises from the inadequacy of the consideration, is contradicted by direct and positive proof, that then the whole ground of relief fails. But it would seem from the case cited by Mr. Powell, page 158, that it is the inadequacy itself, and not the inadequacy as mere evidence of fraud, which has been made the ground of relief.

2. The purchaser was in distressed circumstances; and here the principle to be extracted from the cases does not appear to be that this distress of the one party affords proof of *imposition* by the other, but rather that the distress has rendered the first *incompetent to act freely*, and that therefore there need be no fraud on the other side.

In *Berney v. Pitt*, 2 Vern. 14, the plaintiff averred imposition, but none was proved; yet he succeeded, because distress was proved.

499] *In the case of *Astley v. Reynolds*, cited 2 Br. Ch. Cas.

Adm'rs of Hough v. Hunt.

156, the party being in distress, was considered *unable to act*, "so that the judgment of the court (says Mr. Justice Burnet) is, that necessity alone could induce him to make the contract."

In *Heathcote v. Paignon*, 2 Br. Ch. Cas. 156, there was no proof of any *advantage* taken of the distress of the complainant.

In *Chesterfield v. Jansen*, 1 Atk. 252, Lord Hardwicke says that chancery "will relieve against *presumptive fraud*, so that equity goes farther than the rule of law, for there fraud must be proved and not presumed." But he can not mean that a court of law will not relieve against fraud, proved by presumptive evidence, for such is not the fact. The distinction intended to be established is not between the evidence which will prove fraud in the two courts, but between actual fraud and cases which, though they do not amount to fraud, are cases of great and intolerable hardship. That must be the meaning of this great judge.

3. *Third persons*, and particularly *the representative of the general creditors of the intestate*, have a much stronger interest and right to impeach the transaction than the intestate himself. This is the rule with regard to lunatics, who can not stultify themselves after their reason is restored, but their heirs may; although in *Webster v. Woodford*, 3 Day, 90, the Supreme Court of Connecticut have held that the lunatic himself may file a bill to rescind.

In 8 Cranch, 37, it was held that the *trustee* of an insolvent debtor might take advantage of a defect in a mortgage which the insolvent himself could not, because he represented (as in this case the administrator does) the general creditors.

BRUSH and FITZGERALD, for respondent:

We concur in opinion with the learned counsel for complainants that the true rule is laid down upon this subject, how far and when a chancellor ought to relieve by rescinding contracts on the ground of inadequacy by Chancellor Kent, in the case of *Osgood v. Franklin*, 2 Johns. Ch. 23.

*The impression which fastened itself upon our minds, [500 when we saw that case referred to in his argument, was that he did so lest it should be supposed he was afraid of the effect it might have upon the case of his clients. But by appearing to rely on it, as an authority in their favor, it would be supposed he deemed it not unfavorable, much less decisive against them. The chancellor asserts, page 23: "There is no case where mere inadequacy

Adm'rs of Hough v. Hunt.

of price, independent of other circumstances, has been held sufficient to set aside a sale made between parties, standing on equal ground and dealing with each other, without imposition or oppression." If unqualifiedly he means this (and he does, or he has not spoken with his usual circumspection), the only inquiry to be made in this case is, if there exists, in fact, any of those "other circumstances," amounting to "imposition or oppression" which will warrant a court of equity "in setting aside the sale" made in this case. Such circumstances are charged in the bill as that decedent was in embarrassed circumstances, and that this was known to the defendant, who took advantage of the situation of decedent to impose on him a hard contract. We venture to hope that what is charged against defendant and not proved, will be disregarded. If so, this case will be considered clear of any imputation or fraud, imposition or oppression, or any other circumstance to discolor it injuriously to the defendant, or inconsistent with the most perfect fairness on his part. Then admitting the disproportion between price and value, as stated by plaintiff's counsel, one-half, this court will be bound upon authority to dismiss the bill. Two cases cited by the chancellor in the above case of *Osgood v. Franklin*, 2 Johns. Ch. 23, 24; *Martlock v. Butler*, and *Day v. Newman*, 10 Ves. 292, 300, are decisive, as exactly analogous in principle and fact. It seems in those case the court would not entertain a bill to give relief on either side, either to rescind or enforce the contract. The disproportion was at least one-half, but there was no fraud. Chancellor Kent cites these two cases with approbation; he can not, therefore, be supposed to mean that where the inequality is no greater, that its grossness may, nevertheless, amount to fraud, 501] without any other circumstances *affecting the conscience of the party charged with fraud. When he adds, after the quotation above made, "and the inequality amounting to fraud must be so strong and manifest as to shake the conscience and confound the judgment of any man of common sense," we understand him to mean that the inequality must be so great that no sensible man can resist the conclusion, "*ex evidentia rerum*," that advantage was taken of weakness or distress, knowing that this weakness or distress existed.

By the Court:

From the evidence in this case, it is manifest that at the time

Adm'rs of Hough v. Hunt.

of the contract for the sale of the land in question, the vendor knew that the purchaser was in some degree embarrassed. It is also fully proved that the land was not worth half the price that Hough agreed to pay for it. The circumstances of the case are altogether extraordinary. Hough is hard pressed for the sum of two thousand five hundred dollars. He applies to Hunt for a loan of that sum. He obtains it, and an engagement that the lender will loan him seven thousand five hundred dollars more upon good security. But at the same time the twenty-five hundred is borrowed, and a contract made for a further loan, a contract of sale is made for a tract of land at eleven thousand nine hundred and seventy-five dollars, being more than double its real value. Two thousand three hundred and twenty-five dollars of which, with the money actually loaned, is secured upon other property than that sold.

The mind revolts at the idea that a man so embarrassed would, to obtain the loan of two thousand six hundred dollars, voluntarily embarrass himself further, by creating a new debt of eleven thousand nine hundred and seventy-five dollars for property not worth half that sum. It is impossible that the vendor, who also made the loan, was not sensible that he was taking advantage of the purchaser's necessity. The imprudence of the proceeding, on the part of Hough, was so gross that it could justly be attributed to no other cause.

It is not in proof that Hunt knew the extent of Hough's embarrassments. But he knew that he was in necessity to *some extent; of that necessity he must have been sensible [502 he took advantage, in exacting the contract for the sale of land. The wish to obtain further loans and the agreement to make them, with the subsequent escape from performing that agreement, are strong circumstances in confirmation of the fact that Hunt knew Hough's situation and acted upon it.

One peculiar hardship of the case is that, upon account of this unconscionable contract, Hunt has fastened a part of the purchase money upon Hough's other lands, sweeping from previous creditors that which their means had supplied, and retaining to himself the whole consideration which his contract was supposed to advance.

The rule in chancery is well established. When a person is incumbered with debts, and that fact is known to a person with

Stone v. Ruffin.

whom he contracts, who avails himself of it to exact an unconscionable bargain, equity will relieve upon account of the advantage and hardship. Where the inadequacy of price is so great that the mind revolts at it, the court will lay hold on the slightest circumstances of oppression or advantage to rescind the contract. So, when a person borrowing money to relieve his necessities is induced to purchase property at an exorbitant price, and to an amount greatly beyond the loan obtained, and secure the payment by mortgage on his other lands, the necessity of the purchaser, connected with the exorbitancy of price, are sufficient evidence of unfair advantages to justify the interference of the court. We consider this a case of great exorbitancy of price, where the purchaser was deeply embarrassed, and where the vendor availed himself of that embarrassment to exact the bargain. We are, therefore, of opinion that the contract of purchase be rescinded, and that the mortgage remain a lien only for the money loaned and interest.

503] ETHAN STONE, FOR THE USE OF THE BANK OF CINCINNATI, v. WILLIAM RUFFIN, SHERIFF.

Sheriff can not be required by the plaintiff to pay money made on execution before return of writ. Demand made before return is no foundation for amercement.

THIS was a writ of error to the judgment of the court of common pleas of Hamilton county, on a motion to amerce the sheriff, in which judgment was given for the defendant. It was reserved in Hamilton county, and the case was as follows:

The notice to amerce recited a judgment and execution, Ethan Stone, for the use, etc. v. Joel Williams. It recited a levy and a sale upon execution, returnable to April term, 1824, a sale made on February 23, 1824. A notice to the sheriff that the Bank of the United States were the real owners of the judgment, and a notice from them that they would not receive paper of the Bank of Cincinnati in payment. A demand of payment, made on the sheriff, March 1, 1824, and a refusal to pay, except in paper of the Bank of Cincinnati, for which the sale had been made.

Dudley et al. v. Little.

The defendant put in an answer to the motion, alleging that it was no case for amercement; that there was no law authorizing the amercement, and relying upon the statute of limitations. The common pleas gave judgment for the defendant, to reverse which this writ of error was brought.

The cause was elaborately argued by Este and Fox, for plaintiff in error, and by C. Hammond and N. Wright, for defendant. It was, however, decided upon a point not involving the general merits, and the arguments are therefore omitted.

By the Court:

Upon examining this record, we find that the writ of execution was returnable to April term, 1824; that the sale was made in February, 1824, and the demand upon the sheriff to pay over the money was made March 1, 1824. The demand thus made is not one upon which the sheriff can be subjected, on motion, to amercement. He is not *bound to pay over the money to the [504 plaintiff until return of the writ. On the contrary, he ought to hold it until the proceedings have been examined, and the sale confirmed by the court. The judgment must for this reason be affirmed.†

[The following two cases, decided on the circuit in 1826, were omitted in their proper place, and are here inserted:]

DUDLEY ET AL., HEIRS OF I. LUDLOW, v. WILLIAM LITTLE.

Upon a sale of land for taxes, an agreement among several that they will advance funds, and one shall buy, so as to prevent competition, and afterward divide the land purchased among them, is fraudulent, and equity will relieve against the purchase.

THIS case was heard in Delaware county, before Judges BURNET and SHERMAN, in 1826.

†NOTE BY THE EDITOR.—Sheriff can not be amerced for not executing *ca. sa.*, unless it is indorsed "funds deposited," etc., x. 45. Nor where return is regular, though false, xii. 220. Other cases relating to amercement, see xii. 210; Wright, 720; vi. 449; i. 275.

Dudley et al. v. Little.

The bill stated that the complainants, as heirs at law of Israel Ludlow, were the proprietors of a tract of land situated in the county of Delaware, on which the taxes had not been paid; that at a sale of land for taxes, three hundred and seventy acres of the land in question, worth three dollars per acre, had been sold by the collector, and purchased by the defendant for thirty-three dollars and seventy-three cents. The bill charges that a fraudulent combination had been formed by the defendant and sundry other persons, to purchase large tracts of land at the said sale for the purposes of speculation; that it had been agreed between the defendant and those who were to participate in the profits of the speculation, that the defendant alone should bid; that the other partners in the contract should advance their portions of the purchase money, and receive their share of the profits; and that, in pursuance of that fraudulent agreement, the defendant had purchased the land in question, and obtained for it a collector's deed. The prayer of the bill was to set aside the deed and restore the complainants, etc.

The defendant demurred to the bill.

505] *J. K. CORY, for the complainants, cited 4 Johns. Ch. 254; 3 Johns. Cas. 29; 6 Johns. 194; 8 Johns. 444.

PETTIBONE, for the defendant, cited Steele v. Worthington, 2 Ohio, 182.

By the COURT:

A partnership or contract formed for the purchase of land at a sale for taxes, is against the policy of the law; and if such contract or partnership be entered into for the express purpose of making such purchases, it is a fraud on the owner of the property, and the purchaser can not obtain an available title.

Such combinations have, necessarily, a direct tendency to prevent competition, which it is the duty of the legislature and the policy of the law to encourage. Over a sale of this description, the owner has no control—he can not refuse a bid, or adjourn the sale, or fix a sum below which the property shall not be struck down. The sale is managed by the agent of the state. The owner is not consulted. The highest bidder becomes the purchaser, although the sum bid be less than a hundredth part of the

Smiley v. Wright et al.

value of the property. This being the case, any combination which has a tendency to reduce the price of the property, by preventing competition, must operate as a fraud on the owner. The effects of such combinations can not be controlled by any vigilance on the part of the owner.

It frequently happens that large quantities of land are offered for sale on these occasions, in the absence and without the knowledge of the owners; and if such combinations are permitted, all the persons present at the sale might form themselves into companies, and, by an agreement not to bid against each other, might purchase in the whole of every tract offered for the amount of tax due on it.

We do not mean to say that partners can not purchase property at a tax sale, for the convenience of the business they are engaged in, when speculation is not their object, but that a partnership or combination can not legally be formed for the purpose of making such purchases. As this ^{was} evidently the fact in the case [506 before us, the complainants are entitled to a decree. They must take it, however, on the condition of refunding the purchase money and interest, with the penalty of fifty per cent. allowed by law, and on the payment of cost.

JAMES SMILEY AND WIFE v. JOHN C. WRIGHT ET AL.

Widow entitled to dower, present at the sale under order of court, and asserts that the sale may be made free from dower, in consequence of which the price is increased, is thereby barred of dower, although the purchaser was not ignorant of her title.

THIS was a bill in chancery, prosecuted to recover the dower of the complainant, Elizabeth, before Judges Pease and Sherman.

The bill states, in substance, that Joseph Lewis, the former husband of the complainant, Elizabeth, purchased part of lots Nos. 174, 175, and 176, in the town of Steubenville, went into possession, made large and valuable improvements on them; that he paid the full amount of the purchase money, but had not obtained a legal title thereto, and died in the year 1807, leaving her his

Smiley v. Wright et al.

widow. The bill further states that administration of the estate of said Lewis was granted to Jacob Fickas, since deceased, who, in 1810, obtained an order of court to sell the said lots, subject to the complainant's right of dower therein, for the payment of the debts due by the estate of Lewis; that said lots were shortly thereafter sold at public sale, and conveyed by the administrator to the defendant, Hartford, who has since conveyed them to the defendant, Wright. The bill charges that Hartford and Wright knew, at the time they respectively purchased, of the complainant's right of dower, and that, in 1819, she demanded of the defendant Wright, who was then in possession, claiming title to the lots, to set off and assign her dower. The bill states, as a reason why no demand of dower was made before 1819, that she was ignorant of her right; that Fickas, the administrator, was her brother, in whom she had the most perfect confidence, and that he always informed her she had no right in her husband's real or 507] personal estate until the debts were paid, *when she would be entitled to one-third of the residue. The bill further charges that Hartford has procured a legal title to the lots by a conveyance to him from the vendor of Lewis, and prays that dower may be assigned, and a decree for a just portion of the rents and profits.

The answers of the defendants admit the purchase of the lots by Lewis, his possession, the payment by him of a considerable part of the purchase money, his death, the administration granted to Fickas, the order of court to sell, subject to the widow's dower, the sale and conveyance of the whole interest of Lewis to Hartford, and his conveyance to the defendant Wright, and the demand of the complainant to have her dower assigned. The answers aver that, about the time of sale by the administrator, the complainant, Elizabeth, received a lot in the town of Steubenville, in satisfaction of her claim of dower, and at the time of sale she agreed that the lots should be sold free from any claim by her for dower, she having relinquished her right.

Much testimony having been taken in the cause, it was brought to hearing on the pleadings and proofs.

HALLOCK and GOODENOW, for complainants.

WRIGHT and COLLIER, for defendants.

By the COURT:

It is a peculiar feature of the law of Ohio that the widow of a deceased person is not only entitled to dower in the legal estate of which the husband was seized, during coverture, but also in any equitable estate which he may hold in lands at the time of his death. It is in virtue of the statutory provision endowing the widow with one-third part of all the right or interest the husband had at the time of his decease in any lands or tenements, that the complainants claim dower in the premises described in the bill. Lewis, the former husband of the complainant, Mrs. Smiley, had purchased the property of which dower is claimed, gone into possession, made valuable improvements thereon, paid a considerable part of the purchase money, leaving the balance a debt due by his estate, which was subsequently paid *by the adminis- [508] trator, without obtaining a conveyance of the legal estate. He had, therefore, although not a legal estate of inheritance, an equitable interest in the lots, of which his widow, at his death, was entitled to her dower by the provisions of our statute. And that dower must now be assigned to her, in conformity to the prayer of the bill, if she has done no act since his death to divest herself of that right, or to bar her from enforcing it in equity.

Upon this part of the case two questions have been made. Did the complainant, Mrs. Smiley, receive from Fickas, the administrator of Lewis' estate, any compensation or satisfaction for or in lieu of her dower?

Whether the circumstances attending the sale of the premises of which dower is claimed bar her in equity, on the ground of fraud, from claiming her dower from Hartford, and all others holding under him?

Upon the first question, whether the widow of Lewis received from Fickas, the administrator, any compensation in lieu of her dower, much contradictory testimony has been taken.

It is unnecessary to state the evidence relied upon by either party on this point. The defendants claim, in their answers, that it was agreed between Fickas and the complainant, Mrs. Smiley, that she should receive a lot on Fourth street, in Steubenville, and some materials for building, in lieu of her dower. That the lot was conveyed to her, and the building materials furnished. They have called on her, under a provision of the statute, by filing interrogatories, in the nature of a cross bill, to answer on oath,

Smiley v. Wright et al.

whether such an agreement was not made and executed. She denies, by her answer, any such agreement, and states that she did not receive the lot on Fourth street, and building materials, in satisfaction of her dower, but that Fickas retained the amount of the purchase money of the lot and materials, out of money belonging to the children of her husband, and due to her for their maintenance. This answer is supported by the testimony of the guardian of those children, who states he was present at the settlement, and that it was agreed that the amount charged by Fickas, for the lot and materials furnished by him, should be applied in paying her for supporting the children.

509] *That some conversation took place, between Mrs. Smiley and Fickas, respecting her dower in the premises, is perfectly certain; but what that conversation was, or whether any, and if any, what agreement was made between them, is uncertain. The lapse of time, and the death of Fickas, who was the active agent in all the transactions mentioned by the witnesses, and who compensated Mrs. Smiley for her dower, if in fact she ever received a compensation, has involved the question in doubt and uncertainty. Sufficient appears to excite a suspicion of her having received something in lieu of her dower. Yet the evidence is not sufficiently clear and explicit to induce a court of equity to decree against her claim, on the ground of her having received satisfaction.

The next question made is, whether the circumstances attending the sale of the premises to Hartford, are such as bar Mrs. Smiley, in equity, from claiming her dower. The evidence upon this part of the case is clear, explicit, and uncontradictory. J. Edington testifies that he attended the sale as the agent of Hartford. The property was put up, subject to the widow's dower, and that it was bid up to about two thousand four hundred dollars. Fickas, after the property had been cried for some time at that price, and it was evident no greater bid could be obtained, expressed his unwillingness to have it sold for that price, and, at his request, the biddings were suspended, to enable him to consult with the widow, and ascertain if she would agree to have the property sold free of dower. Fickas and the widow went into a back room, where they were engaged some time in conversation, no part of which he heard. The witness was near the door of the room, and when they came out Fickas observed she had agreed to have the property sold free of dower. This was proclaimed at the front door by the crier; the

biddings resumed, and the property struck off to witness, as the agent of Hartford, at about three thousand dollars. He would not have given over two thousand four hundred dollars, had he not have understood that the widow relinquished her dower. R. Moor's testimony is to the same effect. S. Salmon states he was the auctioneer. The widow was present, and must *have [510 heard him cry the sale as free from her claim of dower, and that the property was sold as unincumbered by any right of dower. J. Worstell states he was present at the sale. Mrs. Smiley was standing in the door; the auctioneer being on the step, when it was struck off. That he heard the auctioneer frequently state, that the sale was free of dower, while she was in a situation she must have heard him; and on one occasion replied to him she had no claim to dower.

It is apparent from this testimony, which is altogether uncontradicted, that after the suspension of the sale, it was understood by the persons attending, that the property was to be sold unincumbered by the widow's dower. That she was present, aiding by her acts and declarations, in confirming this opinion, and that the purchaser was thereby induced to bid about six hundred dollars more than he otherwise would have given.

It is a well-established principle in equity, that if a person, having a right to an estate, permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right. 16 Ves. 253; 4 Munf. 449; 11 Johns. 564; 6 Johns. Ch. 166. And the rule prevails, even against *feme covert*s and persons under age. 9 Mod. 35; 5 Ves. 174; *Cory v. Girtchin*, 2 Mad. 40.

It is contended, on the part of the complainants, that the acts and declarations of Mrs. Smiley, at the time of the sale of the lots in question, ought not to bar her of the aid of a court of equity, because she was at that time ignorant of her rights, nor can they be considered as a fraud upon the purchaser, as he had notice of her title.

It is unnecessary to consider whether a person, having legal title to lands, who encourages the sale by another, shall be permitted to show his ignorance of that title, to the prejudice of a *bona fide* purchaser for a valuable consideration, as we are clearly of opinion that the evidence does not prove Mrs. Smiley's ignorance of her rights, at the time of the sale by the administrator. If she would avoid the effect of her acts and declarations, on the

Smiley v. Wright et al.

ground of being ignorant of her rights, she should at least raise a strong presumption of that ignorance, by the proof of facts and 511] *circumstances, from which it could fairly be inferred. The proof relied upon, is the answer of Mrs. Smiley to the interrogatories of the defendant, Wright, in which she states that "Fickas always told her that nothing would be coming to her until all debts were paid, and this she believed to be true, until about the time suit was brought;" and the testimony of Fleming, who states that as late as 1817 he heard Fickas tell her she was entitled to the interest of one-third of the proceeds of the estate, both real and personal, after all debts were paid. The answer of Mrs. Smiley is contradicted, in some material facts, by the testimony of a number of disinterested witnesses, and much weight can not, therefore, be given to her statements. The declaration made to her by Fickas, in 1817, furnishes no ground to presume that in 1810 she was ignorant of her right of dower. The legal presumption is, she was acquainted with her rights. The order of court was, to sell the lots subject to her dower. They were advertised to be so sold, and the biddings proceeded for some time, with the knowledge of all present of the existence of this incumbrance.

The sale was suspended under the belief that if her claim of dower could be removed, a more advantageous sale would be effected. She was consulted, and it was proclaimed in her hearing, that the lots were to be sold free of her dower. The biddings recommenced, and the lots sold at an enhanced price. Under these circumstances the proof should be clear and strong, to justify the court in finding her ignorant of any right in the property.

It is also said that Hartford had notice, at the time of his purchase, of her title, and therefore her acts and declarations could not tend to deceive him.

It is undoubtedly true that the agent of Hartford had notice, at the commencement of the public sale, that the lots were subject to the widow's dower, and his biddings were regulated by his knowledge of this fact. But during the progress of the sale, he was informed she had relinquished her right of dower, and she confirmed this information by her acts and declarations. If she had not, in fact, relinquished her right of dower, her standing by, permitting 512] *the property to be sold free of dower, without asserting her claim, was calculated to deceive, and defraud the purchaser, and did induce him to pay a much larger sum for the property than

Smiley v. Wright et al.

he would otherwise have given. He believed she had relinquished her dower, and acted upon this belief. To permit her to assert her title to dower, against a *bona fide* purchaser, for a valuable consideration, who was induced by her to purchase, because she has never executed any formal act of assignment, or release of her dower, would be to aid her in the commission of fraud. The bill must be dismissed.†

†NOTE BY THE REPORTER.—This cause was afterward submitted to the whole court, sitting at Columbus, upon a petition for a rehearing. After a full examination of the pleadings and proofs, a rehearing was refused.

†NOTE BY THE EDITOR.—That if a person having a right to an estate, or an interest therein, permit or encourage a purchaser to buy it of another, the purchaser shall hold it divested of the interest of the person so acquiescing, is in the following Ohio cases, besides the above, iii. 5; iv. 384; v. 333; x. 288, and cases cited in the last two cases.

INDEX.

ACCORD—

Note given upon accord, payable at a day future, is a good consideration. *Ellis v. Bitzer*, 89.

ACTION—

1. Cause of action set out defectively, can not be supplied by proof. *Heirs of Waldsmith v. Adm'rs of Waldsmith*, 156.
2. Joint action can not be sustained by distributees of personal estate for their several shares. *Ib.* 156.
3. Action on the case does not lie where the injury complained of is direct and immediate. *Case and Davis v. Mark*, 169.
4. Whenever the injury is direct and immediate, trespass is the proper action. *Ib.* 169.
5. Sureties, where judgment is against them, can not sue separate actions against their principal under the statute, but must join in one action. *Litler v. Horsey*, 209.
6. Action of covenant can not be sustained by lessor against the lessee's assignee of part of the leased premises. *Fulton and Kirker v. Stuart*, 215.
7. Case is the proper action for sheriff against commissioners, to recover damages sustained by escape for want of jail. *Commissioners of Brown County v. Butt*, 348.

ADMINISTRATOR—

1. Administrator, with the will annexed, can not execute a power to sell land, conferred by the will upon the executor. *Wills v. Cowper et al.* 124.
2. Defendant, though named as administrator, may be charged by evidence against him individually. *Waldsmith's Heirs v. Waldsmith's Adm'rs*, 156.
3. Administrators not liable to joint action of distributees for their distributable shares. *Ib.* 156.

AGREEMENT—

1. Agreement made by persons who understood their rights, not relieved against in equity, unless in strong case of imposition. *Steele et al. v. Worthington*, 182.
2. What is not such a case. *Ib.* 182.

 Amendment—Attachment.

AGREEMENT—Continued.

3. Where a person deeply in debt, to obtain a loan of money, agrees to purchase a tract of land at more than double its value, in connection with the loan, and gives a mortgage upon other property to secure the loan, and part of the purchase money, the vendor being apprised of the purchaser's necessities, equity will rescind the contract. *Hough's Adm'rs v. Hunt*, 495.
4. Agreement among several, that at a sale of land for taxes one only should bid, the others to advance their share of the purchase money, and receive their share of the profits, is fraudulent, and will be set aside in equity. *Ludlow's Heirs v. Little*, 504.

AMENDMENT—

Process against two, one not served, declaration against one, appearance and plea by one, verdict against both and judgment—may be amended at a subsequent term. *Hammer v. McConnell*, 31.

APPEAL—

1. In replevin, plaintiff may appeal from judgment of voluntary nonsuit. *Reed v. Carpenter*, 79.
2. Transcript from an appellate court, not evidence of the original proceedings in the same cause. *Gibbs v. Fulton*, 180.
3. Appeal dismissed where bond is given after verdict, but before judgment. *Wilson v. Holeman*, 253.

ASSIGNMENT—

1. Where plaintiff sues for the use of a third person, it is not necessary to show a transfer of the subject of the action. *Numlin's Adm'r, etc. v. Westlake*, 24.
2. Assignment indorsed upon a note, retained by assignor until his death, and found among his papers, vests no interest in the assignee. *Clark v. Boyd*, 56.
3. Assignee of part of leased premises not liable to action for rent by lessor. *Fulton and Kirker v. Stuart*, 215.
4. Assignment indorsed on the back of a deed does not pass the title. *Lessee of Bentley's Heirs v. DeForest*, 221.
5. Patentee of land is not bound to prove the assignment of warrant, entry, or survey. *McArthur v. Thomas et al.* 415.

ASSIGNEE—

Assignee of bond for the conveyance of town lots, to which no value is affixed, can not sue in his own name, under the act of 1810. *McCutchen v. Keith, Assignee*, 262.

ATTACHMENT—

1. In *certiorari* upon attachment issued by a justice of the peace, error in fact may be assigned. *Hartshorn v. Wilson*, 27.
2. It is error to sue attachment against one, as an absconding debtor, who has not, in fact, absconded. *Ib.*
3. Attachment certified from justice to common pleas, the jurisdiction of the common pleas is original. *Vancleve v. Wilson*, 202.

Bond—Collector.

ATTACHMENT—Continued.

4. In foreign attachment, under the act of 1810, three months' notice must be given. *Colwell, Adm'r, v. Bank of Steubenville*, 229.

BOND—

1. Bond obtained from a person intoxicated, by procurement of obligee, may be avoided at law by plea. *Lacy v. Garrard's Adm'rs*, 7.
2. Bond for appeal to Supreme Court, given after verdict, but before judgment, appeal not consummated. *Wilson v. Holeman*, 253.
3. Assignee of a bond for the conveyance of town lots, to which no value is affixed, can not sue upon it in his own name. *McCutchen v. Keith*, 262.
4. Bond given for prison limits, where debtor is not actually in prison, is void. *Lytle, Adm'r, v. Davies*, 277.
5. Joint bond for prison limits, given in several separate suits, void. *Ib.* 277.
6. Bond for redelivery of property executed and not sold for half the appraisement, under act of 1820, and not redelivered or tendered to the officer who made the levy or his representatives within six months, is forfeited, though no new execution is sued out. *Wright v. Lepper and Ledley*, 297.
7. Judgment on sheriff's bond must be for the penalty, and execution must go for the sum due. *Smith's Adm'rs v. Commissioners of Licking County*, 312.

BOUNDARY—

1. Where a deed calls for a corner standing on the bank of a creek, "thence down said creek, with the several meanders thereof," the boundary is the water edge at low-water mark. *McCulloch's Lessee v. Aten*, 307.
2. Where deed describes land as seventy acres in the southwest corner of a quarter section, land is bounded on an equal square. *Walsh's Lessee v. Ringer*, 327.

BILL OF EXCEPTIONS—

There is no law in Ohio authorizing bystanders to certify bills of exceptions *Murphy v. Lucas*, 225.

BILL OF REVIEW—

1. In bill of review, the original bill, answers, exhibits, and depositions are open for examination, where the decree does not state the facts found and principles decided. *Ludlow's Heirs v. Kidd's Heirs et al.* 372.
2. Parties in interest, though not parties to the original bill, may be made parties to bill of review, and when decree is reversed, bill of review stands, as to them, a supplemental bill. *Ib.* 372.

CERTIORARI—

Cause commenced before a justice by attachment, and removed by *certiorari* to the common pleas, error in fact may be assigned. *Hartshorn v. Wilson*, 27.

COLLECTOR—

Where the proportion of the land tax due to the county has not been paid,

 Consideration—Declaration.

COLLECTOR—Continued.

the collector, in an action on his official bond, can not set off county orders against the claim. *Byers et al. v. State*, 106.

CONSIDERATION—

A consideration, other than that expressed in a deed, but not contradictory to it, may be given in evidence under particular circumstances. *Steele et al. v. Worthington*, 182.

CONSTABLE—

If a constable is duly elected, takes the oath of office, and gives a bond, he may justify acting as constable (as making an arrest), although the obligee in the bond be not such as is required by law. *Barret v. Reed*, 409.

COPY—

1. When copy of a deed only is produced, parol proof can not be received to supply defective acknowledgment. *Johnson's Lessee v. Harris*, 55.
2. Where the acknowledgment of a deed is defective, copy from the record can not be admitted in evidence. *Ib.* 55.

COUNTY—

1. Where sheriff, for want of a jail, has been subjected to an action of escape, the county is liable. *Commissioners of Brown County v. Butt*, 348.
2. The liability of the county to the sheriff does not depend upon the degree of negligence in furnishing a jail. *Ib.* 348.
3. In a suit by the sheriff against the county in such case, the record of the recovery against the sheriff is admissible evidence. *Ib.* 348.

COSTS

After the defendant appears, and the cause is continued, it is error to dismiss the suit on motion, for want of security for costs. A rule to enter security should be taken. *McVickar v. Ludlow's Heirs*, 259.

COVENANT—

1. Where the clause of a deed containing the covenant of seizin is blank as to the names of those who are seized, it does not amount to a covenant of seizure by the grantors. *Day v. Brown*, 345.
2. A covenant in a deed, to warrant and defend, "as executors are bound by law to do," is not a personal covenant. *Ib.* 345.

DECLARATION—

1. Declaration upon a common promissory note, in the same form as upon a specialty, is sufficient. *Mors v. McCloud*, 5.
2. Declaration upon a mutilated note need not notice the mutilation. *Duckwall and wife v. Weaver*, 13.
3. Though the declaration set out the case defectively, yet if the plea state the fact omitted, the judgment, after verdict, ought not to be arrested. *McFeely v. Vantyle*, 197.
4. Count in assumpsit upon a receipt for money, good after verdict, though it do not aver the money was received for plaintiff's use. *Maxfield v. C. and A. Johnson*, 204.
5. Declaration in a note to B. K., or bearer, payable in cattle, in the name

Decree—Ejectment.

DECLARATION—Continued.

of the holder, must aver the note was delivered to plaintiff for a good consideration. *Byington v. Geddings*, 227.

6. Declaration upon indorsement of guaranty, on a promissory note, must aver consideration. *Greene v. Dodge and Cogswell*, 430.

DECREE—

1. Time for performing a decree in equity, may be enlarged. *Baird v. Shepherd*, 261.
2. Decree in equity against guardian, touching the real estate of his ward, does not affect ward unless he is made a party to the original suit. *Este and Longworth v. Strong et al.* 401.

DEED—

1. Acknowledgment of deed insufficient, where officer taking it gives himself no official character. *Johnson's Lessee v. Haines*, 55.
2. *Quere*, if in such case, proof by parol could be received to supply the defect? *Ib.* 55.
3. Deed from tenant in common, purporting to be in severalty, conveys all the grantor's interest within the described boundaries. *White's Lessee v. Sayre*, 110.
4. Consideration, other than that expressed in a deed, may be given in evidence, if it does not contradict the consideration expressed in the deed itself. *State et al. v. Worthington*, 182.
5. Assignment indorsed on deed does not convey title. *Bentley's Heirs, Lessee of, v. DeForest*, 221.
6. Deed calls for a corner on the bank of a creek, thence down said creek, with the meanders thereof, low-water mark is the boundary. *McCulloch's Lessee v. Aten*, 307.
7. Description in a deed, seventy acres in southwest corner, includes the land in an equal square. *Walsh's Lessee v. Ringer*, 327.
8. Clause in a deed blank as to the names of the party seized, does not amount to a covenant of seizin by grantors. *Day v. Brown*, 345.
9. Covenant in a deed, to warrant and defend, as executors are bound by law to do, is not a personal covenant. *Ib.* 345.

DEVISE—

A devise to a husband and wife and their heirs, the devisees take as tenants in common. *Sergeant and wife v. Steinberger*, 305.

DIVORCE—

Where the petitioner is living in adultery, a divorce is never granted. *Mattox v. Mattox*, 233.

DOWER—

1. A widow, upon a sale of her husband's estate, stands by and hears the sale proclaimed to be free from dower and is silent, she is barred of dower. *Smiley and wife v. Wright et al.* 506.

EJECTMENT—

1. Mortgaged premises may be recovered in ejectment by mortgagee where all the money is due and unpaid. *Ely's Lessee v. McGuire*, 223.

 Endorsers—Equity.

EJECTMENT—Continued.

2. In ejectment by purchaser of land at sheriff's sale, the judgment debtor can not set up an outstanding mortgage given by himself. *Phelps' Lessee v. Butler*, 224.
3. Equitable title can not be set up by tenant in possession, as a defense in ejectment against legal title. *Spencer's Lessee v. Marckel*, 263.
4. Joint demise by tenants in common, good. *Lessee of Massie's Heirs v. Long et al.* 287.
5. Demise by *prochein ami* bad. *Ib.* 287.
6. Conveyance by lessor, after ejectment brought, does not defeat plaintiff's right of recovery. *Dawson's Lessee v. Porter*, 304.
7. Proof by plaintiff that the original grantee is within the exception of the statute of limitations, throws upon defendant the burden of proving an intermediate owner without the exception. *Thompson's Lessee v. Gibson and Jolly*, 339.

ENDORSERS. See INDORSERS.**ENTRY—**

1. Land covered by survey and patent, but not included in entry, is vacant, and may be entered as vacant land. *Hastings v. Stevenson*, 8.
2. Construction of entry. *Ib.* 8.
3. What is sufficient notoriety. *Martin v. Boon and McDowell*, 237.
4. Invalid entry may obtain sufficient notoriety to become a good locative call. *McArthur v. Thomas and others*, 415.
5. Can not be made good by subsequent notoriety. *Ibid*, 415.
6. Originally void on account of disproportion of length and breadth, may be rendered valid by withdrawal of part so as to make proper proportions. *Ib.* 415.
7. Notoriety of entry. *Ib.* 415.

EQUITY—

1. Will not relieve against a bond obtained from obligor when intoxicated, by procurement of obligee, unless good reason be shown why defense was not made at law. *Lacy v. Garrard's Adm'rs*, 7.
2. Will not decree a specific performance, where the party asking it insists upon obtaining an unconscionable advantage. *Townsend v. Alexander*, 18.
3. Does not relieve where matter was triable at law, and no reason is assigned for not trying it there. *McCarty v. Burrows*, 20.
4. Cases not relievable in equity. *Wood and Beckelheymer, Adm'rs, v. Archer*, 22; *Duckwall and wife v. Zimmerman*, 23; *Wood v. Pratt and Davis*, 23.
5. Does not relieve against agreement made by parties, who understand their rights, unless in strong case of imposition. *Steele et al. v. Worthington*, 182.
6. Time for performing a decree in equity may be enlarged. *Baird v. Shepherd*, 261.
7. Equitable title with possession can not be set up as a defense, in ejectment against the legal title. *Spencer's Lessee v. Marckel*, 263.

Error—Evidence.

EQUITY—Continued.

8. An execution upon the judgment at law, and a return that sufficient property could not be taken to satisfy the debt, is not indispensable to authorize a proceeding in chancery under section 59 of the chancery law. *Gilmore v. Miami Exporting Co.* 294.
9. Equity does not grant a new trial, where party asking it has been guilty of neglect. *Dorfinger v. Coll*, 311.
10. Application in chancery for a new trial at law refused by division of opinion among the judges. *Waddle and McCoy v. Bank U. S.* 336.
11. In partnership transactions, equity will interfere to ascertain the rights of the parties, and if upon such adjustment, debts are found due in the same rights, between the same persons, will direct a set-off. *Sarchet v. Sarchet's Adm'rs*, 320.
12. Equity does not apply the doctrine of abatement or compensation to the defendant, in decreasing specific performance. *Courcier and Ravises v. Graham*, 341.
13. In equity, allegations made on one side, and not admitted or denied by the other, are considered in issue, and may be proven. *McArthur & Thomas et al.* 415.
14. Agreement, though made for some consideration, if made under circumstances of unfairness and advantage, relieved against in equity. *Smith v. Loring*, 440.
15. Agreement set aside in equity because unconscionable advantage taken of party's necessity. *Hough's Adm'rs v. Hunt*, 495.

ERROR

1. Error in fact may be assigned, in *certiorari*, in a case commenced by attachment. *Hartshorn v. Wilson*, 27.
2. Judgment in foreign attachment, under the act of 1810, is erroneous unless three months' notice be given. *Colwell, Adm'r, v. Bank of Steubenville*, 229.
3. After appearance and continuance of a cause, it is error to dismiss it on motion for want of security for costs. *McVickar v. Ludlow's Heirs*, 259.
4. Writ of error and supersedeas, delivered to sheriff when about to sell land upon a *vendi.*, puts an end to his authority; when judgment is affirmed, proceedings must commence where they were suspended, and if the *vendi.* is returned, a new one must issue. *Conn v. Doyle*, 318.
5. Judgment for a less sum than the verdict is not an error for which defendant can reverse it. *Starret v. Creed*, 343.

ESCAPE. See SHERIFF.

EVIDENCE—

1. Where subscribing witness to a note denies his signature, other witnesses may be called to prove the execution. *Duckwall and wife v. Weaver*, 13.
2. Note partly mutilated may be given in evidence, though described in the declaration as an entire note. *Ib.*
3. Conviction for swearing can only be proved by transcript from the docket of the justice before whom it was had. *Robbins v. Budd*, 16.
4. The subscribing witness being out of the jurisdiction, proof of his hand-

Execution.

EVIDENCE—Continued.

- writing is *prima facie* evidence of the execution of the instrument. *Clark v. Boyd*, 56.
5. Evidence that a sale of goods to O. was made upon an understanding that W. was his partner, and upon the credit of W., is admissible against W., but not available, without other proof of partnership. *Austin and Taylor v. Williams et al.* 61.
 6. Evidence may be received of usages and customs among merchants; opinions of witnesses are inadmissible. *Ib.* 61.
 7. Evidence may be given to charge defendant individually, though sued as administrator. *Waldsmith's Heirs v. Waldsmith's Adm'rs*, 156.
 8. Evidence can not supply cause of action defectively set out. *Ib.* 156.
 9. Action founded upon a proceeding in an inferior court removed by appeal, the transcript of the proceedings of the appellate court can not be received as evidence. *Gibbs v. Fulton*, 180.
 10. Evidence may be given, in certain cases, of a consideration in addition to that expressed in a deed. *Steele et al. v. Worthington*, 182.
 11. Declarations made by a witness before his examination, contrary to his statements when examined, admissible to discredit his testimony. *Lamb v. Stewart*, 230.
 12. In ejectment, deed made by lessor after suit brought, is not admissible evidence. *Dawson's Lessee v. Porter*, 304.
 13. Proof by plaintiff in ejectment that the original grantee, under whom he claims, is within the exception of the statute of limitations, throws upon the defendant the burden of proving an intermediate owner without that exception. *Thompson et al. v. Gibson and Jolly*, 339.
 14. Record of a recovery against the sheriff for an escape for want of a jail admissible evidence in a suit between sheriff and the county. *Commissioners of Brown County v. Butt*, 348.
 15. Complainant having obtained patent as assignee, is not bound to prove purchase from assignor. *McArthur v. Phoebe et al.* 415.

EXECUTION—

1. Construction of execution law as to priority of lien. *McCormick v. Alexander*, 62.
2. Sales upon need not be advertised in other place than a newspaper, printed in the county. *Fitch v. Dunlap's Heirs*, 78.
3. Purchaser under execution, can not maintain trespass for acts done while out of possession, except he recover possession by ejectment. *Beggs v. Thompson*, 95.
4. Mortgaged premises may be sold on execution against mortgagor. *Ely's Lessee v. McGuire*, 223.
5. Execution issued after defendant's death, upon judgment rendered in his lifetime, does not authorize sale of decedent's lands. *Lessee of Massie's Heirs v. Long et al.* 287.
6. An execution and return of no goods, not indispensable to authorize proceedings in chancery under section 59 of the chancery law. *Gilmore v. Miami Exporting Company*, 294.

Forcible entry and detainer—Judgment.

EXECUTION—Continued.

7. Upon *capias* for a fine, defendant may surrender land in discharge of his body, and the land so surrendered may be sold by sheriff without valuation. *Walsh's Lessee v. Ringer*, 327.
8. Only execution and proceedings under it to be examined on motion of a deed from sheriff. *Buckingham & Co. v. Granville Alex. Society*, 360.
9. Execution levied within the year, levy set aside, and not again made within the year, priority of lien lost, against subsequent judgment creditor, whose levy was made within a year, and continued until sale. *Patton v. Sheriff of Pickaway County*, 395.
10. Setting aside the levy on an execution, places parties as they would have been had no levy been made. *Ib.* 395.
11. Sale on execution may be enjoined in equity, if no bill would pass at law. *Bank U. S. v. Schultz*, 471.

FORCIBLE ENTRY AND DETAINER—

Complaint in forcible entry and detainer must describe the property with sufficient certainty. *Murphy v. Lucas*, 255.

INDORSER—

1. Indorser of a promissory note guaranteeing payment by the maker, not liable unless payment demanded and notice given. *Greene v. Dodge and Cogswell*, 430.
2. One of two partners, without the knowledge and consent of his copartner, substitutes the partnership for his individual indorsement on an accommodation note. He is individually accountable to the copartner for any consequent loss. *Smith v. Loring*, 440.
3. The recognition of, and voluntary payment of such indorsement to the creditor, does not change liability between the partners. *Ib.* 440.

INFANT—

1. Decree in equity against guardian, affecting the real estate of the ward, does not bind ward, unless he was party to the original suit. *Este and Longworth v. Strong et al.* 401.
2. Ward can not, by purchasing paramount title, overreach a lien given by his guardian, on real estate claimed by and in possession of the ward, as inherited from ancestor. *Ib.* 401.

INJUNCTION—

Sale on execution may be enjoined, where no title would pass to purchaser. *Bank U. S. v. Shultz*, 471.

INSOLVENT DEBTOR—

1. Original application of an insolvent is *ex parte*. *Loines v. Phillips*, 313.
2. Surety in an insolvent debtor's bond is liable when the petition is dismissed, on application of plaintiff, and for want of residence. *Ib.* 313.

JOINT TENANTS—

No joint tenancy in Ohio. *Sergeant and wife v. Steinberger et al.* 305

JUDGMENT—

1. May, in a proper case, be amended at a term subsequent to the rendition. *Hammer v. McConnell*, 31.

 Jurisdiction—Land.

JUDGMENT—Continued.

2. Judgment against one joint trespasser can not be pleaded in bar to a separate action against another joint trespasser for same trespass. *Wright v. Lathrop*, 33.
3. Lien of judgment as regulated by execution law of 1824. *McCormick v. Alexander*, 65.
4. Judgment not arrested, though declaration set forth defective title, if the plea states the fact omitted. *McFeely v. Vantyle*, 197.
5. In declaring upon a receipt for money, declaration does not aver it was received for plaintiff's use. After verdict, judgment not arrested. *Maxfield v. C. and A. Johnston*, 204.
6. Mortgage in January and judgment in July, mortgage not delivered for two years, and mortgagor in possession, the judgment has the preferable lien. *Hood v. Brown and Bentley*, 266.
7. Judgment on sheriff's bond must be for the penalty. *Smith's Adm'r v. Commissioners of Licking County*, 312.
8. Judgment against three of four securities. In a bill against fourth for contribution, judgment is not conclusive. *Thompson v. Young et al.* 334.
9. Judgment for less sum than found by verdict is not an error prejudicial to defendant. *Sterret v. Creed*, 343.

JURISDICTION—

1. Supreme Court does not take jurisdiction of cases certified from the court of common pleas, unless the record set out the cause for certifying it. *Knaggs v. Conant*, 26.
2. Upon attachment certified to the court of common pleas from a justice, the jurisdiction of the common pleas is original, not appellate. *Vancleve v. Wilson*, 202.

LAND—

1. Land, though surveyed and patented, is nevertheless vacant, if not included in the entry. *Hastings v. Stevenson*, 8.
2. Register of land office might legally purchase land at public sale, under the act of Congress of May, 1800. *Steele et al. v. Worthington*, 182.
3. Lease for school land not valid, unless acknowledged by grantors before judge or justice. *Lessee of Atkinson v. Dailey*, 242.
4. Land can not be conveyed by assignment indorsed on the back of a deed. *Lessee of Bentley's Heirs v. De Forest*, 221.
5. In Virginia military district, lands divided by county lines, where the owner resides on part, must be listed for taxation in the county where the owner resides. If otherwise listed and sold, the sale is void. *Hughey's Lessee v. Horrell & Co.* 231.
6. Can not be sold for taxes, unless advertised in two newspapers, one at the seat of government, the other in the county, if one printed there; if not the one in most general circulation there. *Ib.* 231.
7. Title to land in Ohio does not pass by an insolvent's assignment of his estate, real and personal, in Pennsylvania. *Lessee of McCulloch's Heirs v. Rodrick & Co.* 234.

Land—Mortgage.

LAND—Continued.

8. Occupying claimant of land entitled to pay for improvements made before his title commenced. *Shaler's Lessee v. Magin*, 235.
9. Land can not be sold on execution issued after defendant's death, on judgment rendered in his lifetime. *Lessee of Massie's Heirs v. Long et al.* 287.
10. Land sold upon a *procedendo* from the general court, after judgment affirmed in writ of error, where proceedings were suspended after levy on *fi. fa.*, sale is void. *Conn v. Doyle*, 318.
11. Land may be surrendered to the sheriff in discharge of the body taken in execution for a fine, and sold without valuation. *Walsh's Lessee v. Ringer*, 327.
12. Lien of vendor. *Tiernan v. Beam et al.* 383.

LEASE—

1. A lease for school lands must be acknowledged by the grantors before judge or justice, otherwise it is not valid. *Atkinson's Lessee v. Dailey*, 212.
2. Lessee assigns part of the leased premises to a third person, for the whole term of the lease. It is but underletting, and lessor can not sustain an action against the assignee. *Fulton and Kirker v. Stuart*, 215.

LIEN—

1. Between vendor and vendee, the vendor has a lien upon lands sold, although personal security be given. *Tiernan v. Beam et al.* 383.
2. Lien of vendor for purchase money passes, by devise of the debt, to the devisee. *Ib.* 382.
3. Priority of judgment lien lost, by setting aside the levy on execution, after the expiration of the year. *Patton v. Sheriff of Pickaway County*, 395.
4. Where a guardian has given a lien upon the real estate claimed by, and in possession of his ward, such lien can not be overreached by ward purchasing a paramount title. *Este and Longworth v. Strong et al.* 401.

MANDAMUS—

Mandamus lies to compel trustees to distribute moneys to religious societies. But it is a good return that the moneys had been all distributed by a former board of trustees. *State, ex rel. Sharp, v. Trustee, etc.* 108.

MERCHANTS—

Usage and custom of merchants obligatory. *Austin and Taylor v. Williams et al.* 61.

MORTGAGE—

1. Where mortgage money is due and unpaid, mortgagee may recover mortgaged premises in ejectment. *Ely's Lessee v. McGuire*, 223.
2. Lands mortgaged may be sold on execution against mortgagor. *Ib.* 223.
3. Where lands have been sold at sheriff's sale, and ejectment is brought against the judgment debtor by the purchaser, the defendant can not set up an outstanding mortgage given by himself. *Phelps' Lessee v. Butler*, 224.

 New trial—Plea.

MORTGAGE—Continued.

4. Mortgage executed in January, judgment in July, 1821; mortgage not delivered until 1823, and mortgagor remaining in possession, the judgment has the preferable lien. *Hood v. Brown and Bentley*, 266.

NEW TRIAL—

- Equity does not interfere to grant new trial, where party has been guilty of neglect. *Dorfinger v. Coil*, 311.

NOTE—

1. In an action upon promissory note it is sufficient to declare as upon a specialty. *Mors v. McCloud*, 5.
2. Note mutilated may be described in declaration, without notice of that fact. *Duckwall and wife v. Weaver*, 13.
3. Suit brought in the name of the payee of a note, for the use of a third person, it is not necessary to prove the transfer. *Numlin, Adm'r, etc. v. Westlake*, 24.
4. Note payable to R. K. or bearer, holder may recover in his own name, but must aver and prove it was delivered to him for a good consideration. *Byington v. Geddings*, 227.
5. Indorsement of a promissory note, guaranteeing payment by the maker, declaration must aver consideration, payment must be demanded of maker, and notice of non-payment given. *Greene v. Dodge and Cogswell*, 430.

NOTICE—

1. Doctrine of notice has no application between claimants of conflicting titles. *McArthur v. Phoebus et al.* 415.
2. Title originally defective can not be protected against a better adverse title, by plea of innocent purchase without notice. *Ib.* 415.

OCCUPYING CLAIMANT—

- Improvements made before title commenced, occupant entitled to pay for them. *Shaler's Lessee v. Magin*, 235.

OFFICER—

- Public officer receives money to pay to public creditor, and upon payment of part obtains a receipt for the whole. He is liable for the residue, though no deception or fraud is practiced. *Slaughter v. Hamm*, 271.

PARTNERSHIP—

1. Partnership having assumed no name, one partner may bind the others by contracting in the name of himself and company. *Austin and Taylor v. Williams et al.* 61.
2. One partner who indorses the partnership name, without the knowledge or consent of his partner, to remove his own individual indorsement, is accountable to his partner for the loss. *Smith v. Loring*, 440.
3. Subsequent recognition and payment does not change liability between the partners. *Ib.* 440.

PLEA—

1. Former conviction, in a case for profane swearing, can only be proved by transcript from the docket of the justice. *Robbins v. Budd*, 16.

Pleadings—Set-off.

PLEA—Continued.

2. Where the plea states a fact omitted in the declaration, judgment after verdict will not be arrested, because declaration sets out title defectively. *McFeely v. Vantyle*, 197.
3. Plea of justification in slander is bad, unless it distinctly admit speaking the words. *Davis v. Mathews*, 257.

PLEADINGS. See **EQUIT.**

POUNDAGE—

Sheriff is only entitled to poundage, where he actually receives the money on the execution. *Vance v. Bank of Columbus*, 214.

POWER—

1. Power given by will to executor to sell lands, can not be executed by administrator with the will annexed. *Wills v. Cowper and Parker*, 124.
2. Executor empowered by will to dispose of the estate, and to settle and adjust testator's worldly affairs, is authorized to convey lands upon a compromise of claim to part of them. *Steele et al. v. Worthington*, 182.

PRISON BOUNDS—

1. Person arrested and not actually in prison, gives bond for prison bounds. The bond is void. *Lytle, Adm'r, v. Davies*, 277.
2. Joint prison bounds bond, in several separate suits, void. *Ib.* 277.

REGISTER—

Under act of Congress of May, 1800, register of land office might legally purchase land at public sale. *Steele et al. v. Worthington*, 182.

REPLEVIN—

In replevin, plaintiff may appeal from voluntary nonsuit. *Reed v. Carpenter*, 79.

SALES—

Sale upon execution need only be advertised in newspaper printed in the county. *Fitch v. Dunlap's Heirs*, 78.

SCI. FA.

1. *Sci. fa.* to make heirs party to judgment against administrators, and subject lands taken by descent to execution, must recite the judgment in form unsatisfied, and that the personalties are exhausted. *McVickar v. Ludlow's Heirs*, 248.
2. *Sci. fa.* from common pleas to subject lands on the judgment of a justice can not issue, unless the transcript from the justice show an execution returned no goods, and a suggestion that the defendant owned lands. *Edmiston v. Edmiston*, 251.

SET-OFF—

1. Collector can not set-off county orders against the claim of plaintiff, in a suit on his official bond. *Byers et al. v. State*, 106.
2. Set-off directed in equity between partners where, upon equitable adjustment, debts are due between same persons in the same rights. *Walsh's Lessee v. Ringer*, 327.

 Sheriff—Taxes.

SHERIFF—

1. Sheriff only entitled to poundage where the money is received by him on the execution. *Vance v. Bank of Columbus*, 214.
2. Where prisoner escapes because there is no jail, sheriff liable for escape. *Commissioners of Brown County v. Butt*, 348.
3. In such case the county is liable to the sheriff. *Ib.* 348.
4. Proper form of action for the sheriff is case. *Ib.* 348.
5. County liable without reference to degree of negligence. *Ib.* 348.
6. In motion for an order to sheriff to make a deed, execution and proceedings under it only to be examined. *Buckingham & Co. v. Granville Alexandria Society*, 360.
7. Sheriff not bound to pay money on execution, before return day of the writ; demand made before that time no ground for amercement. *Stone v. Ruffin*, 503.

SLANDER—

Plea of justification, in slander, must admit speaking the words, or it is bad on demurrer. *Davis v. Mathews*, 257.

SPECIFIC PERFORMANCE—

1. Not decreed in favor of one who insists upon an unconscionable advantage. *Townsend v. Alexander*, 18.
2. In decreeing specific performance, doctrine of abatement and compensation not applied to defendant. *Courcier and Ravises v. Graham*, 341.
2. In an entire contract for the sale of five quarter sections of land, a separate bond given for the conveyance of two, purchaser can not have specific performance without performing on his part the entire contract. *Tiernan v. Beam et al.* 383.

SURETIES—

1. Where judgment is against sureties, they must join in an action against their principal, under our statute. *Little v. Horsey*, 209.
2. Surety notifies creditor to sue; to sue surety alone is not a compliance with the statute. *Starling, Ex'r, v. Buttles*, 303.
2. Security in an insolvent debtor's bond liable although application is dismissed at the motion of the other party for want of legal residence. *Loines v. Phillips*, 313.
4. Bank charter extended; original security of the cashier not liable for defalcations after extension. *Thompson v. Young et al.* 334.
5. Judgment at law against three of four securities, in a bill for contribution against the fourth, judgment does not conclude him. *Ib.* 334.

SURVEY—

Survey of land not included in the entry, does not prevent subsequent entry, though made after the act of 1807. *Hastings v. Stevenson*, 8.

TAXES—

1. Land in Virginia military district, divided by county lines, where the owner resides on part, must be listed for taxation where owner resides. Sale void if otherwise listed and sold. *Hughey's Lessee v. Horrell & Co.* 231.

 Tenants in common—Witness.

TAXES—Continued.

2. Sales for taxes must be advertised in a newspaper printed at the seat of government, and one printed in the county, or if none printed in the county, then the one of most general circulation therein. *Ib.* 231.
3. Part of a lot, or one acre of a lot, too vague a description to sustain sale of land for taxes. *Lessee of Massie's Heirs v. Long et al.* 287.
4. Combination not to bid at sale of land for taxes, but to furnish money to one bidder, and divide the gains upon purchase, is fraudulent, and will be set aside in equity. *Dudley et al., Ludlow's Heirs, v. Little*, 504.

TENANTS IN COMMON—

1. A tenant in common may convey a part of his undivided interest. *White's Lessee v. Sayre*, 110.
2. Deed by tenant in common, purporting to be in severalty, is good for the grantor's undivided part, within the boundaries described. *Ib.* 110.
3. Tenants in common can make a joint demise in ejectment. *Lessee of Massie's Heirs v. Long et al.* 287; *Wilkinson's Lessee v. Fleming*, 301.
4. Devise to husband and wife and their heirs, devisees take as tenants in common. *Sergeant and wife v. Steinberger et al.* 305.

TRESPASS—

1. Verdict and judgment in trespass against one, no bar to a separate action against another for the same trespass. *Wright v. Lathrop*, 33.
2. In trespass against five, accord and satisfaction from two is a bar to the suit. *Ellis v. Bitzer et al.* 89.
3. Trespass does not lie for the purchaser of land at sheriff's sale, where he obtains possession without ejectment, for acts done before he obtained possession. *Beggs v. Thompson*, 95.
4. Trespass is the only proper action, where the injury is direct and immediate. *Cass and Davis v. Mark*, 169.
5. In such case, plaintiff can not bring case at his election. *Ib.* 169.

USES—

Quere, whether statute of uses (27 Hen. 8, chap. 10) was ever in force in Ohio. *Thompson Lessee et al. v. Gibson and Jolly*, 339.

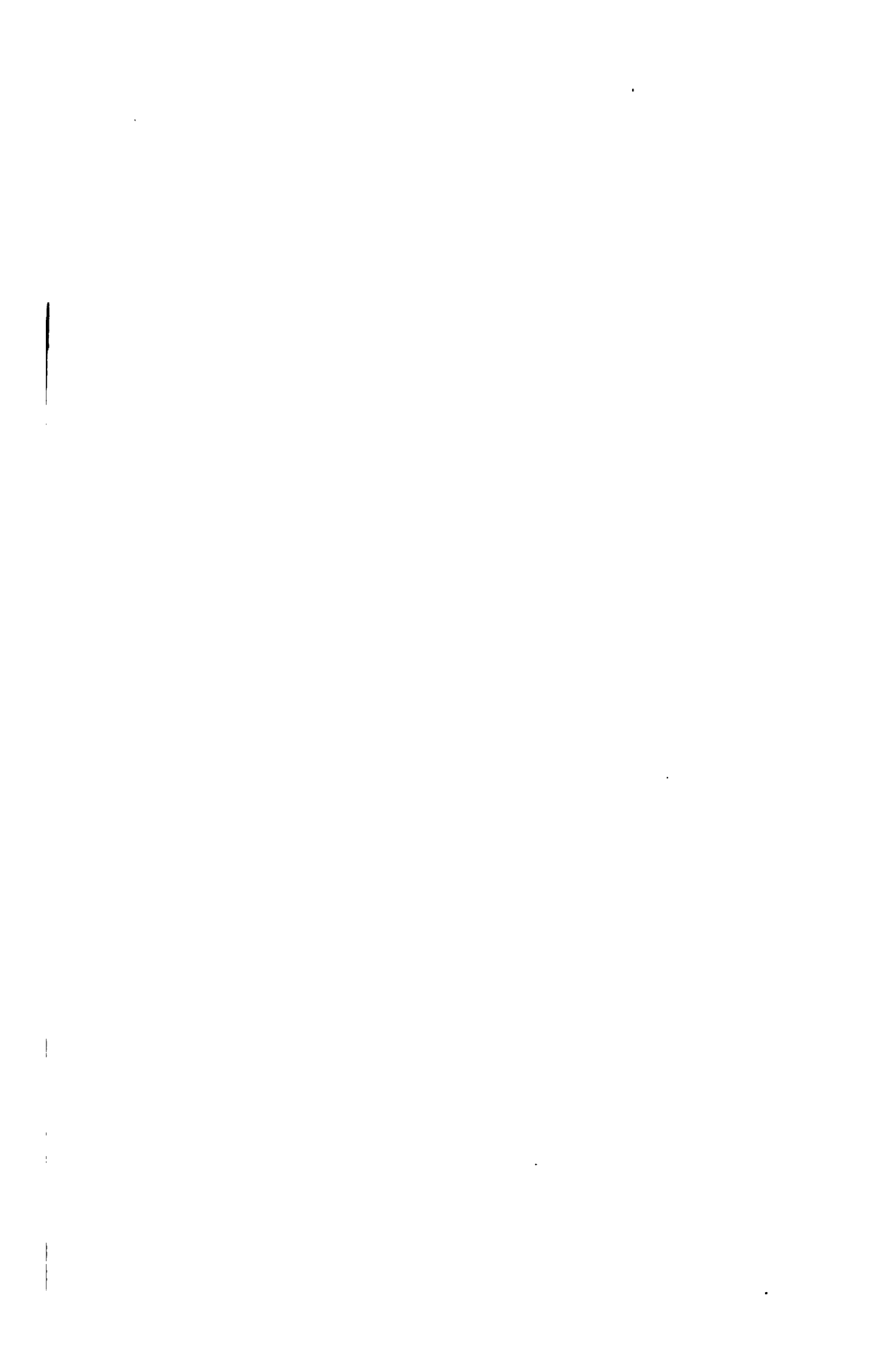
VENDOR—

Vendor retains a lien for purchase money upon lands sold, against the vendee, although security be taken. *Tiernan v. Beam et al.* 383.

WITNESS—

1. When subscribing witness denies his signature, other witnesses may be examined to prove the execution of the writing. *Duckwall and wife v. Weaver*, 13.
2. Where other proof can be had, that a witness who resides out of the jurisdiction, it is unnecessary to take out a subpoena. *Clark v. Boyd*, 56.
3. Where subscribing witness is out of the jurisdiction, proof of his handwriting is *prima facie* proof of the execution of the instrument. *Ib.* 56.
4. Declarations made by witness previous to his examination, admissible to discredit his testimony. *Lamb v. Stewart*, 230.

1786 60



HARVARD LAW LIBRARY